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dministrative Law Judge Decisions

Secretary of Labor, MSHA v. NACCO Mining Company, Docket Nos. LAKE 85-87-R, LAKE 86-2. (Judge Merlin, January 14, 1986)

Secretary of Labor, MSHA v. Youghiogheny & Ohio Coal Company, Docket No. LAKE 84-98. (Judge Kennedy, January 22, 1986)

There were no cases filed in which review was not granted.

COMMISSION DECISIONS

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

February 13, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 83-212
PYRO MINING COMPANY	:	

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

On January 30, 1986, the United States Court of Appeals for the Sixth Circuit issued a per curiam decision in Pyro Mining Company v. FMSHRC, etc., No. 84-4022, affirming in part and reversing and remanding in part the decision of the Commission's administrative law judge in Pyro Mining Company, 6 FMSHRC 2488 (October 1984)(Docket No. KENT 83-212)(ALJ). (The judge's decision became a final decision of the Commission through operation of the Mine Act, 30 U.S.C. § 823(d)(1).)

In accordance with the Court's remand order to the Commission, this matter is remanded to the administrative law judge originally assigned for further appropriate proceedings consistent with the Court's opinion.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. LAKE 84-96-M

OZARK-MAHONING COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety snd Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)(the "Mine Act"), and raises two issues: (1) whether Ozark-Mshoning Company ("Ozark-Maho violated 30 C.F.R. § 57.15-4, a mandatory ssfety standard requiring the use of ssfety glasses or other suitable eye protective devices; 1/ snd, if so, (2) whether the violation was "significsnt and substantial" within the meaning of seetion 104(d)(1) of the Mine Aet, 30 U.S.C. § 814(d)(1). Following a hearing on the merits, a Commission administrative law judge found thst Ozark-Mahoning violated the standsrd and that the violstion was significant and substantial. The judge imposed civil penalty of $350. 7 FMSHRC 1050 (July 1985)(ALJ). For the follow reasons, we affirm the judge's deeision.

1/ 30 C.F.R. § 57.15-4 states:

> All persons shall wear safety glasses, goggles, or face shields or other suitable protective deviees when in or around sn area of a mine or plant where s hazard exists which could cause injury to unprotected eyes. (emphasis added).

30 C.F.R. § 57.15-4 was recodified without change in 1985 as 30 C.F.R. 57.15004. 50 Fed. Reg. 4048, 4116 (January 29, 1985).

observed miners, Dennis Darnell and Wendell Hicks, "collaring" drill holes with a jackleg percussion drill. 2/

Because the miners were drilling without eye protection and rock fragments were flying off the mining face, Inspector LaLumondiere issued a citation alleging a violation of 30 C.F.R. § 57.15-4. The inspector also found that the violation was significant and substantial. Immediate after receiving the citation, the mine superintendent obtained safety glasses for both miners and instructed them to wear the glasses while drilling.

The judge found that Ozark-Mahoning violated section 57.15-4 based upon undisputed testimony that the two miners were "collaring drill holes ... and drilling without wearing safety glasses or other eye protection" and that "rock fragments and chips fly out from the face while drilling and particularly while collaring holes." 7 FMSHRC at 1051. We conclude that substantial evidence of record supports the judge's finding. The miners admitted that they were not wearing safety glasses while drilling on the morning the inspector issued the citation. Also, Ozark-Mahoning did not dispute the testimony of the inspector that the process of collaring drill holes causes rock chips and fragments to fly out from the face posing a danger to the drillers' eyes and that many such eye injuries have been reported. In fact, Darnell, testified that "It is not that uncommon to get a piece in your eye every now and then when you're drilling." Tr. 48. Darnell added, "If it's anything you can't get out, we go to the lunchroom ... and we've got a bottle of solution there that we wash our eyes out and go back to work." Tr. 58. The testimony of the inspector and Darnell establishes that a violation of section 57.15-4 occurred.

In addition to challenging the judge's finding of a violation on substantial evidence grounds, Ozark-Mahoning contends that the cited standard is unenforceably vague. Ozark-Mahoning argues that because the standard does not specifically require the use of eye protection when drilling, it is not clear to the operator whether the standard is applicable when drill holes are collared. We find no merit in this argument. Section 57.15-4 is the type of safety standard that is drafted in general terms in order to be broadly adaptable to the myriad circumstances in a mine. Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981). Such a standard is not unenforceably vague when a reasonably prudent person, familiar with the mining industry and protective purpose of the standard would recognize the hazardous condition which the standard seeks to prevent. U.S. Steel Corp., 6 FMSHRC 1908, 1910 (August 1984); U.S Steel Corp 5 FMSHRC 3, 5 (January 1983); Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (December 1982). Therefore, the pertinent inquiry here is whether

2/ "Collaring a hole" is explained as: "The formation of the front end of a drill hole, or the collar, which is the preliminary step in drilling to cause the drill bit to engage in the rock." Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral, and Related Terms 234 (1968).

Given the record evidence of the presence of a hazard to the rillers' eyes attested to by the inspector and Ozark-Mahoning's riller, we hold that a reasonably prudent person familiar with the ndustry would recognize the hazard. Therefore, the standard is pplicable to the cited condition and the vagueness challenge is ejected.

Ozark-Mahoning also contests the judge's "significant and ubstantial" finding. It contends that the Secretary failed to prove hat there was a reasonable likelihood that if an injury occurred it ould be reasonably serious. We disagree.

A "significant and substantial" violation is described in section 04(d)(1) of the Mine Act as a violation "of such nature as could signifi-antly and substantially contribute to the cause and effect of a coal or ther mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation s properly designated significant and substantial "if, based upon the articular facts surrounding the violation there exists a reasonable ikelihood that the hazard contributed to will result in an injury or llness of a reasonably serious nature." Cement Division, National ypsum Co., 3 FMSHRC 822, 825 (April 1981).

In this case, the inspector testified that he had suffered a "bad ut" on his right eye while collaring a drill hole without safety glasses nd that numerous eye injuries of this type are reported. Moreover, it s obvious that whenever foreign objects are propelled into the eye here is a reasonable likelihood of loss or impairment of vision as well s injury. The fact that the driller has so far avoided serious injury s fortunate, but not determinative. Therefore, we conclude that the udge's significant and substantial finding must be affirmed.

strative law judge is affirmed.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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nistrative Law Judge Gary Melick
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February 28, 1986

DISCIPLINARY PROCEEDING : Docket No. D 86-1

BEFORE: Ford, Chairman; Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

In this disciplinary matter pending before Chief Administrative L Judge Paul Merlin, the attorney whose conduct is the subject of the proceeding has filed with the Commission a Motion to Quash the judge's setting of the hearing site in Washington, D.C. 1/ Originally, the judge noticed the hearing for February 27, 1986, in Washington. Following an objection from the attorney as to the timing and location of the hearing, the judge, by order dated February 5, 1986, reschedule the hearing date for March 7, 1986, to accommodate the attorney, but retained the Washington hearing site. In the present motion, the atto asserts that the Commission "has no authority or jurisdiction to subpo individuals to testify at Commission hearings when said individual liv 450 miles from the hearing [s]ite." This jurisdictional argument is meritless and must be rejected. 30 U.S.C. § 823(d) & (e). We note al that the attorney is a party in this matter -- indeed, is the subject the proceeding -- not merely a witness.

1/ This case arose from n disciplinnry referral made by Commission Administrative Law Judge George A. Koutras in White Oak Coal Co., 7 FMSHRC 2039, 2047-52 (December 1985). On January 8, 1986, we referred the matter to Judge Merlin for appropriate proceedings under Commissio Procedural Rule 80(c), 29 C.F.R. § 2700.80(c). Judge Merlin assigned the matter to himself.

governs the setting of appropriate hearing sites and requires a careful balancing of interests. 29 C.F.R. § 2700.51. See Cut Slate, Inc., 1 FMSHRC 796, 796-98 (July 1979). The judge hereby is requested to reexamine his choice of hearing site specifically in view of the principles set forth in Cut Slate.

Accordingly, this matter is returned to the judge for proceedings consistent with this order. 2/

Ford B. Ford, Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

2/ For purposes of ruling on this motion, we have designated ourselves as a panel of three members under section 113(c) of the Mine Act. 30 U.S.C. § 823(c).

ADMINISTRATIVE LAW JUDGE DECISIONS

5203 LEESBURG PIKE
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JOHN ED COX, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. SE 85-127-D
TENNESSEE CONSOLIDATED COAL, Respondent	:	MSHA Case No. BARB CD 85-39

DECISION

Appearances: John Ed Cox, Gruetli, Tennessee, pro se;
William I. Althen, Esq., Smith, Heenan & Althen, Washington, D.C., for Respondent.

Before: Judge Melick

On May 22, 1985, the Complainant, John Ed Cox, filed a complaint of discrimination under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., "the Mine Safety Act," with the Secretary of Labor, Mine Safety and Health Administration (MSHA) against Tennessee Consolidated Coal. That complaint was denied by MSHA and Mr. Cox thereafter filed a complaint of discrimination with this Commission on his own behalf under section 105(c)(3) of the Mine Safety Act. Mr. Cox alleges that he sufferred discrimination because he was "bumped to the second shift" by a less senior employee.

Tennessee Consolidated Coal in its Answer responded inter alia, that the complaint "fails to state a claim against Respondent upon which relief can be granted". That response may be taken as a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the purposes of such a motion, the well pleaded material allegations of the complaint are taken as admitted. 2A Moore's Federal Practice, ¶ 12.08. A complaint should not be dismissed for insufficiency unless it appears to a certainty that the complainant is entitled to no relief under any state of facts which could be proved in support of a claim. Pleadings are, moreover, to be liberally construed and mere vagueness or lack of detail is not grounds for a motion to dismiss. Id.

Section 105(c)(1) of the Mine Safety Act provides as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment, has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such representative of miners or applicant for employment has instituted or caused to be instituted any proceedings under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

In order to establish a violation of section 105(c)(1) the Complainant must prove that he exercised a right or activity protected by the Mine Safety Act and that his transfer to the second shift was motivated in any part by the exercise of that protected activity. See Secretary ex. rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds, sub nom, Consolidation Coal Company v. Secretary, 663 F.2d 1211 (3rd Cir., 1981). In this case Mr. Cox asserts that he was transfered to the second shift in violation of his seniority rights because of his age. At hearings held on the Respondent's Motion to Dismiss Mr. Cox was given further opportunity to explain the nature of his complaint. He readily acknowledged at those hearings that it had nothing to do with safety but was based solely on his perceived denial of seniority rights. Under the circumstances it is clear that the grounds asserted are not within the ambit of protections afforded by the Mine Safety Act. Accordingly the allegations are not sufficient to create a claim under section 105(c) and this case must be dismissed.

ORDER

Discrimination Proceedings, Docket No. SE 85-127-D are hereby dismissed.

Gary Melick
Administrative Law Judge

Distribution:

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rbg

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF CAREY D. RAUCH, Complainant	:	DISCRIMINATION PROCEED Docket No. SE 86-15-DM Hanleyville Quarry & M
v.	:	
MECHANICAL SYSTEMS SERVICES INCORPORATED, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The Solicitor has filed a motion to approve settlem the above captioned discrimination proceedingin the amou $400.00.

The operator was cited for a violation of § 105(c)(the Act when it discharged the Complainant for refusing engage in a practice she thought unsafe. As part of the settlement agreement, the operator has provided the Comp full back pay which was the relief sought. The Solicito advises that no prior discrimination claims and only one assessment have been filed against the operator in the p years. I accept the Solicitor's representations. In vi them the proposed settlement is Approved.

Accordingly, the operator is ORDERED TO PAY $400.00 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Ju

Distribution:

William H. Berger, Esq., U.S. Department of Labor, Offic the Solicitor, 1371 Peachtree Street, N.E., Atlanta, GA (Certified Mail)

s. Carey D. Rauch, Route 2, Box 213-A1, Bythewood, SC 29016
Certified Mail)

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 85-63 A.C. No. 33-00968-03591
v.	:	Nelms No. 2 Mine
YOUGHIOGHENY AND OHIO COAL COMPANY, Respondent	:	

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Petitioner; Robert C. Kota, Esq., St. Clairsville, Ohio, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Petitioner seeks a civil penalty for one alleged violation of a mandatory safety standard, that contained in 30 C.F.R. § 75.400. Respondent concedes that a violation occurred. It contests the classification of the violation as significant and substantial, and contends that the civil penalty proposed is inappropriately high. Pursuant to notice, the case was heard in Wheeling, West Virginia, on November 14, 1985. Carl Minear testified on behalf of Petitioner; Donald Statler testified on behalf of Respondent. The parties waived the filing of post hearing briefs, but each argued its position on the record after the evidence was introduced. I have considered the entire record and the contentions of the parties, and make the following decision.

FINDINGS OF FACT

1. At all times pertinent to this proceeding Respondent was the operator of an underground coal mine in Harrison County, Ohio, known as the Nelms No. 2 Mine.

2. Respondent is of moderate size. It produces approximately 550,000 tons of coal annually.

75.400, the standard involved in this proceeding.

4. The imposition of a penalty in this proceeding will ot affect Respondent's ability to continue in business.

5. The area covered by the order charging the violation nvolved herein was regularly examined by a union fireboss. eports of such examinations on September 22, October 1, ctober 4, October 8, October 11, and October 15, 1984 did not efer to any accumulations of loose coal and coal dust. A eport of an examination on October 18, 1984 states that entries between 3 South seals and shaft and Main West seals nd 3 South because of the top and ribs peeling they look like hey were never rockdusted but were substantially dusted at one ime. My opinion it would be a waste of labor and material ince a real hazard does not exist." The report of examination n October 19, 1984 states: "Part of entry to the top and ribs eeled and covered all rockdust. I believe no hazard exists ere. And I'm assuming this is the belief of all other nspectors, escorts, firebosses and safety personnel who have ravelled this entry, since no citation was issued, and no ention was ever made of it needing rockdusted." The report of xamination on October 22, 1984 does not refer to accumulations r need for rockdust.

6. MSHA inspectors inspected the area in question on 20 ccasions between June 1978 and September, 1984. No citations r orders were issued charging an accumulation of loose coal, oal dust or other combustible materials.

7. On October 24, 1984, Federal Mine Inspector Carl inear found loose coal and coal dust, 6 to 36 inches deep and 6 feet wide on the mine floor in entries 9, 10, 11 and 12 and he connecting crosscuts for a distance of 2200 feet, and the 4 ain West return entries between the return air shaft and 3 outh seals, a distance of about 3000 feet. These ccumulations resulted from coal sloughage and were black in olor, indicating that rock dust had not been applied. Float oal dust was not present. The inspector issued a 104(d)(1) rder of withdrawal charging a violation of 30 C.F.R. § 75.400.

8. The subject mine liberates in excess of one million ubic feet of methane in a 24 hour period. The area involved n the order including the seals (which seal off abandoned ortions of the mine) is particularly apt to liberate methane. owever, there was a double set of seals here, giving added rotection against methane. At the time the order was issued

9. The Inspector testified that the area in question looked as though it had never been rockdusted or that it had not been rockdusted in many years. In fact, company records indicate that it was rockdusted a total of eight times in 1981, 1982 and 1983. The coal sloughage was such that it covered the rock dust completely. At some time prior to the order, walkways had been made through the areas in question by shovelling the sloughage over against the ribs.

10. The area in question was approximately 5000 feet from the active sections in the mine. It was approximately 200 feet from the track entry.

11. Normally no miners travel the area except the fireboss. No machinery or equipment enters the area with the exception of the tools (including possibly a flame safety lamp) carried by the fireboss.

12. The order was terminated by rockdusting the area involved.

ISSUES

1. Whether the violation was properly designated significant and substantial?

2. What is the appropriate penalty for the violation?

CONCLUSIONS OF LAW

1. Respondent was subject to the provisions of the Mine Act in the operation of its Nelms No. 2 Mine, and I have jurisdiction over the parties and subject matter of this proceeding.

2. The violation of 30 C.F.R. § 75.400 charged in the order of withdrawal issued October 24, 1984 did in fact occur.

3. The violation found was properly designated significant and substantial. The hazard involved here is a mine fire, which could result from an ignition caused by a nonpermissible flame safety lamp in the presence of methane. The violation contributed to the hazard because of (1) the substantial amount of combustible materials and the large area involved, and (2) the gassy nature of the mine and especially the seals area. Should an ignition occur, a fire would be

4. The violation was serious for the reasons set out above.

5. Petitioner contends that the violation resulted from Respondent's negligence since it knew that the accumulations had existed for a long period of time. However, I conclude that its negligence was greatly diminished because MSHA inspectors had travelled the area and observed the accumulations for many years without issuing citations. I conclude the Respondent's negligence was minimal.

6. Respondent has a substantial history of previous violations of the standard in question. This is particularly significant in a gassy mine.

7. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation found is $500.

ORDER

Based on the above findings of fact and conclusions of law, Respondent is ORDERED to pay within 30 days of the date of this decision, the sum of $500 as a civil penalty for the violation found herein.

James A. Broderick
Administrative Law Judge

Distribution:

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF JAMES CORBIN, ROBERT CORBIN, AND A. C. TAYLOR, Complainants,	:	DISCRIMINATION PROCEEDING Docket No. KENT 84-255-D MSHA Case No. BARB 84-35 Sugartree No. 1 Mine
v.	:	
SUGARTREE CORPORATION, TERCO, INCORPORATED, AND RANDAL LAWSON, Respondents	:	

DECISION

Appearances: Carole M. Fernandez, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Complainants; Guy E. Millward, Jr., Esq., and D. Randall Jewell, Esq., Barbourville, Kentucky, for Sugartree Corporation and Randal Lawson, and Carlos R. Morris, Esq., Barbourville, Kentucky, for Terco Incorporated.

Before: Judge Melick

By decision dated December 10, 1985, the Respondents herein were found jointly and severally liable for costs and damages resulting from the unlawful discharge of the named Complainants under section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1). (Appendix A). Hearings were thereafter held to ascertain costs and damages and a decision concerning these matters was issued January 10, 1986 (Appendix B). Interest calculations were subsequently filed by the Secretary on January 24, 1986.

ORDER

Discrimination Proceedings

Sugartree Corportation, Terco, Incorporated and Randal Lawson are hereby directed and ordered, jointly and severally,

James Corbin - $34,173.45
Robert Corbin - $36,355.90
A.C. Taylor - $35,811.74

rders of reinstatement applicable to James Corbin and
Corbin by the interlocutory decisions in this matter
December 10, 1985, and January 10, 1986, are now final.

Penalty Proceedings

Sugartree Corporation, Terco, Incorporated and Randal
are hereby directed and ordered, jointly and severally,
within 30 days of the date of this decision, a civil
ty of $1,000.

Gary Melick
Administrative Law Judge

bution:

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fied Mail)

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF JAMES CORBIN, ROBERT CORBIN, and A.C. TAYLOR, Complainants	:	DISCRIMINATION PROCEEDING Docket No. KENT 84-255-D MSHA Case No. BARB 84-35 Sugartree No. 1 Mine
v.	:	
SUGARTREE CORPORATION, TERCO, INCORPORATED, AND RANDAL LAWSON, Respondents	:	

DECISION

Appearances: Carole M. Fernandez, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Complainants; Guy E. Millward, Jr., Esq., Barbourville, Kentucky for Sugartree Corporation, Hubbs Creek Corporation, and Randal Lawson; and Carlos R. Morris, Esq., Barbourville, Kentucky for Sadd Coal Company, Inc., and Terco Incorporated.

Before: Judge Melick

This case is before me upon the Complaint by the Secretary of Labor on behalf of James Corbin, Robert Corbin, and A. C. Taylor under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging that these miners were discharged from the Sugartree Corporation (Sugartree) on July 6, 1984, in violation of section 105(c)(1) of the Act.[1]

---

[1]Section 105(c)(1) of the Act provides in part as follows: "No person shall discharge . . . or cause to be discharged or otherwise interfere with the exercise of the statutory rights of any miner . . . in any . . . mine subject to this Act because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or operators agent . . . of an alleged danger or health violation in a . . . mine . . . or because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this Act."

April 30, 1985, the Secretary sought to amend his
t by alleging that Randal Lawson was also a "person"
ble for the claimed unlawful discharge of the three
nd that Terco Incorporated (Terco), Sadd Coal
Inc., and Hubbs Creek Corporation were "alter egos"
uccessor corporations to Sugartree and as such were
and severally liable for damages suffered by the
al complainants. The Secretary also asserts in his
complaint that the named business organizations, as
rs or "alter-egos" to Sugartree, must reinstate the
al complainants to positions equivalent to the
s they formerly held with Sugartree since Sugartree
onger in business. Joinder was initially permitted
oses of consolidated proceedings on the merits and to
evidence on the Motion to Amend. For the reasons set
this decision the Secretary's Motion to Amend is
so as to allow retroactive joinder of Terco and
awson as party respondents in this proceeding but is
s to Sadd Coal Company, Inc. and Hubbs Creek
ion. Rule 19, Fed. Rules Civ. Proc. applicable by
f Commission Rule 1(b), 29 C.F.R. § 2700.1(b).

order for the Secretary to establish a prima facie
n of section 105(c)(1) of the Act, he must prove by
derance of the evidence that the individual complain-
aged in an activity protected by that section and
ir discharge or removal from Sugartree was motivated
art by the protected activity. Secretary ex rel.
sula v. Consolidation Coal Company, 2 FMSHRC 2786,
rev'd on other grounds sub nom Consolidation Coal
v. Marshall, 663 F.2d 1211, (3d Cir. 1981). See also
. FMSHRC, 719 F.2d 194 (6th Cir. 1983), and NLRB v.
tation Management Corporation, 462 U.S. 393 (1983),
g burden of proof allocations similar those in the
ase.

e undisputed evidence shows that on the Friday before
4th-of-July vacation at the Sugartree No. 1 under-
ine, James Corbin, the day shift continuous miner
, reported a problem with the water sprays on the
s miner to Joe Watkins, the general mine foreman.
urning to work on July 5, Corbin found that the water
ad still not been repaired and, as a result, dust
by the operation of the continuous miner was "hitting
" and enveloping Corbin and other miners working in
y. Corbin explained that the miner was of necessity
ting 2 to 4 inches of rock in the process thereby
arge quantities rock dust with the coal dust. In
, the ventilation was insufficient to remove the dust
work area. The dust was particularly severe to the

bother, Robert Corbin, were working.

Corbin and the others complained about the dust to fac boss James Proffit. It is not disputed that the dust was so thick and the visibility so limited that the miners were unable to properly test roof conditions as they progressed and were unable to see the continuous miner as it moved in close proximity to the men. In particular James Corbin was unable to see the other miners working near the continuous miner he was operating thereby making it difficult to avoid hitting them.

Proffit reported these initial complaints by the mine telephone to the outside to Mine Foreman Watkins. Watkins reportedly told the men to correct the problem by clamping off the spray bar. The bar was then clamped but the sprays evsn then did not work. Corbin testified that he was able t make about nine cuts with the continuous miner before the dust got so bad that he got sick and started "throwing-up." His eyes were extremely irritated and he could see nothing. Corbin again complained to Proffit who again telephoned the complaint to Watkins. Watkins then told Proffit to tell the men to "cut coal or go home". The entire work crew of 7 decided to go home than rather than work under these conditi

Robert Corbin was working as a jack setter adjacent to the rib on the right side of the continuous miner and only 4 feet from the face. He too complained because of the dust conditions. According to him it was so bad you could not se your out-stretched hand. Even though he wore a painters dus mask his lungs were "burning" from the dust. A. C. Taylor was also working on the right side of the continuous miner that day but as a timberman. According to Taylor the dust was so thick that it filled his eyes, lungs, and nose. He could "neither breathe nor see."

Jerry Bray, then a floating foreman for Sugartree, acknowledged that the conditions were extremely dusty and were therefore hazardous. In particular he found that the right side of the entry was not ventilating properly. Everybody working in the entry was complaining about the dus but the three miners working on the right side were exposed to more dust and were complaining more.

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he "crying" in the mine and Proffit reportedly told
that it was the "right side" meaning Taylor and the
brothers. James Corbin explained that the right side
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because the dust was drawn that way by the ventila-
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nts and/or their protected refusal to work in the face

boss James Proffit. It is not disputed that the dust was so thick and the visibility so limited that the miners were unable to properly test roof conditions as they progressed and were unable to see the continuous miner as it moved in close proximity to the men. In particular James Corbin was unable to see the other miners working near the continuous miner he was operating thereby making it difficult to avoid hitting them.

Proffit reported these initial complaints by the mine telephone to the outside to Mine Foreman Watkins. Watkins reportedly told the men to correct the problem by clamping off the spray bar. The bar was then clamped but the sprays even then did not work. Corbin testified that he was able to make about nine cuts with the continuous miner before the dust got so bad that he got sick and started "throwing-up." His eyes were extremely irritated and he could see nothing. Corbin again complained to Proffit who again telephoned the complaint to Watkins. Watkins then told Proffit to tell the men to "cut coal or go home". The entire work crew of 7 decided to go home than rather than work under these conditio

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based upon a good faith reasonable believe that the continuance of the work under the conditions presented would have been hazardous. See Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981). Accordingly both Randal Lawson as an individual and the Sugartree Corporation, for which Randal Lawson was agent, are "persons" who unlawfully discharged the complainants under section 105(c)(1) of the Act. See footnote 1, supra. For the above reasons Randal Lawson was also properly joined as a party respondent by the amended complaint filed by the Secretary. Rule 19, Fed. Rules Civ. Proc.

Fashioning a remedy in this case through the award of damages and reinstatement has been complicated by what must be construed as evasive efforts by Mr. Lawson and his associates. Indeed it appears that on the same day that two of the complainants presented an order of temporary reinstatement issued by the Commission's Chief Judge to representatives of Sugartree, Sugartree ceased mining operations and many of the same principals, supervisors and employees continued mining operations in essentially the same mine under the same MSHA identity number but under the name of Terco. At the time of hearings Sugartree apparently had no assets and was not engaged in any mining activity. The Secretary accordingly has alleged in his Amended Complaint that an appropriate remedy of damages and particularly of reinstatement cannot be fully obtained without the joinder of Terco as a successor to Sugartree. Rule 19, Fed. Rules Civ. Proc.

In resolving the question of successorship in Munsey v. Smitty Baker Coal Company, Inc., et al, 2 FMSHRC 3463 (1980), the Commission applied the factors used by the Federal Courts in EEOC v. McMillan Bloedel Containers Inc., 503 F.2d 1086, 1094 (6th Cir. 1974). These factors are: (1) whether the successor company had notice of the charge, (2) the ability of the predecessor to provide relief, (3) whether there has been a substantial continuity of business operations, (4)

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[2]MSHA roof and ventilation specialist Roger Dingess also inspected the Sugartree mine on July 10, 1984, and found that the ventilation continued to be seriously inadaquate and was in violation of the ventilation plan. He also found that the sprays on the continuous miner were not then working properly and that excessive dust was in suspension. In addition to the long term health hazard associated with miners breathing respirable dust Dingess observed the immediate hazards caused by lack of visibility and the effects of coughing and vomiting caused by inhaling and ingesting the rock dust.

s the same or substantially the same work force, (6) ther he uses the same or substantially the same super- ory personnel, (7) whether the same jobs exist under stantially the same work conditions, (8) whether he uses same machinery, equipment and methods of production and whether he produces the same product.

There is no dispute that when mining operations shifted m Sugartree to Terco in July 1984, Randal Lawson was sident and Carol McCreary was secretary/treasurer of both artree and Terco. Thus whatever notice these agents of artree had they also had that notice as agents of Terco. ce the intial complaints were filed by the individual ers with MSHA on July 12, 1984, and an investigation was reafter conducted by MSHA it may reasonably be inferred t Terco had notice that charges of unlawful discrimination been made. Indeed since Mr. Lawson was the perpetrator what he should have known was a violation of the Act he uld not now be heard to complain that he, as president and nt of both Sugartree and Terco, did not have notice of the responding liability under the Act of both Sugartree and co. Under the circumstances I find that Terco in fact did e notice of the charges.

Since Sugartree admittedly has no assets and is appar- ly no longer engaged in any business activity it is clear t it could not provide relief either through monetary ages or reinstatement. I also find that a substantial tinuity of business operations was maintained from artree to Terco. Indeed the mine foreman for both artree and Terco, Joe Watkins, testified that he only rned of the changeover when the former vice president of artree and subsequent president of Terco, Terry McCreary, d him. Watkins testified that he saw no other noticeable nge except the method of mining changed around that time "shooting from solid". Watkins testified that six or en or about one-half of the employees of Sugartree also tinued working for Terco.

Watkins also observed that under Terco they continued use the same mine entrance although they began closing off left side of the mine and prepared to mine the right side. re was apparently only a brief delay necessitated by pre- atory matters relating to ventilation before coal produc- n continued. It is observed that the original ventilation n submitted by Sugartree includes both the right side and left side of what has been identified as the Sugartree l Mine. The evidence also shows that Terco began rating on the right side under the same mine identity that

While the evidence shows that the method of mining followed by Terco, known as "shooting from the solid" differed from the method followed by Sugartree, i.e., continuous mining, this change was not significant. While Terco would not have needed a continous miner operator under this method of mining it is clear that the same personnel could have been used in other capacities for which they had been trained. Within the above framework of evidence it is clear that Terco was a successor business entity and accordingly is jointly and severally liable for the illegal acts of discrimination in this case. Accordingly the Secretary's Motion to Amend by also including Terco, Incorporated as a party respondent is also granted. Rule 19, Fed. Rules Civ. Proc. The Motion to Amend to join Sadd Coal Company, Inc. and Hubbs Creek Corporation is denied since the Secretary has not shown that with the joinder of Terco and Randal Lawson complete relief could not now be accorded to the complainants. Rule 19, supra.

ORDER

Terco Incorporated is hereby ordered to immediately reinstate James Corbin, Robert Corbin, and A. C. Taylor to the same (or comparable) positions they held at the time of their "lay-off" on July 6, 1984, at the Sugartree Corporation. It is further ordered that the Secretary of Labor immediately confer with the Sugartree Corporation, Terco, Incorporated, and Randal Lawson, through their representatives if applicable, to determine the amount of costs, damages, and interest due as a result of the unlawful discharges found in this case. The Secretary shall thereafter file with the undersigned a written report of such consultations on or before December 31, 1985. This decision is not a final disposition of this case and no final disposition will be made until such time as the issues of costs, damages and interest are resolved.

CIVIL PENALTY

In light of my findings herein that Randal Lawson discharged James Corbin, Robert Corbin, and A. C. Taylor in clear violation of section 105(c)(1) of the Act and that he knew or should have known that when he discharged those individuals he was doing so in violation of the Act, I find that a high degree of negligence was involved. The violation was quite serious in that the individual miners asserting

ts under the Act. The violation was accordingly quite
ous. I consider that the responsible parties were of
l size and had no history of prior violations of section
c). Wherefore Sugartree Corporation, Terco Incorporated
Randal Lawson will be, upon final disposition of these
eedings, jointly and severally ordered to pay civil
lties in the amount of $1,000.

Gary Melick
Administrative Law Judge

ribution:

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ville, TN 37203 (Certified Mail)

E. Millward, Jr., Esq., P.O. Box 645, Barbourville, KY
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os R. Morris, Esq., P.O. Box 1008, Barbourville, KY 40906
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APPENDIX B

January 10, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF JAMES CORBIN, ROBERT CORBIN, AND A. C. TAYLOR, Complainants,	:	DISCRIMINATION PROCEEDING Docket No. KENT 84-255-D MSHA Case No. BARB 84-35 Sugartree No. 1 Mine
v.	:	
SUGARTREE CORPORATION, TERCO, INCORPORATED, AND RANDAL LAWSON, Respondents	:	

DECISION

Appearances: Carole M. Fernandez, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Complainants; Guy E. Millward, Jr., Esq., and D. Randall Jewell, Esq., Barbourville, Kentucky, for Sugartree Corporation and Randal Lawson, and Carlos R. Morris, Esq., Barbourville, Kentucky, for Terco Incorporated.

Before: Judge Melick

By decision dated December 10, 1985, the Respondents herein were found jointly and severally liable for costs and damages resulting from the unlawful discharge of the named Complainants under section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act". Hearings were thereafter held on the issue of costs and damages on January 2, 1986, in London, Kentucky.

A backpay damage award is the sum equal to the gross pay the miner would have earned but for the unlawful discharge, less his actual "net interim earnings.". Bradley v. Belva Coal Company, 4 FMSHRC 982 (1982); Secretary ex. rel. Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126 (1982). "Net interim earnings" is an accepted term of art which does not refer to net earnings in the usual sense (gross pay minus various withholdings). Rather, the term discribes the employees gross interim earnings less those expenses (if any) incurred in seeking and holding the interim

rred had he not suffered the unlawful discharge. Belva Company, supra.

It is undisputed that at the time of their unlawful harge from Sugartree Corporation (Sugartree), each of the vidual Complainants regularly worked 9 hours a day, 5 a week. They earned $9.50 per hour for the first 40 s a week and $14.75 an hour for the additional 5 hours a overtime. They also worked one Saturday a month in rn for major medical insurance coverage under a Blue s and Blue Shield policy. According to former Sugartree ident Randal Lawson this coverage cost $200 per month for employee. This amount is to be included in the backpay d as a fringe benefit that was an integral part of the lainants wage-benefit package at Sugartree. Northern Co., supra.

The backpay computation based upon the stated earnings fringe benefits should commence on July 6, 1984, the date Complainants were unlawfully discharged and should inate but not include the date of reinstatement or waiver einstatement i.e., January 6, 1986. At hearings on ary 2, 1986, James and Robert Corbin accepted reinstate- to successor mine operator Terco, Incorporated com- ing January 6, 1986. At the same proceedings A. C. or waived his right to reinstatement because he had ined preferable alternative employment.

Robert Corbin also suffered specific losses from his wful discharge because he was thereafter required to e refinance a jeep automobile because of his inability to the higher monthly payments. According to the Bank of iamsburg Mr. Corbin will be required to pay $1,240.84 in tional finance charges because of this refinancing. That nt is properly chargable as damages in these proceedings interest should be charged on that amount in accordance the costs noted in Exhibit D-G-6. See Secretary ex. Noland v. Luck Quarries, Inc., 1 FMSHRC 2426 (1980).

Respondents have the burden of proving mitigation of ges including interim earnings. N.L.R.B. v. Izzi, 395 241 (1st Cir., 1968); and N.L.R.B. v. Mastro Plastics ., 354 F.2d 170 (2nd Cir. 1965), cert. denied 384 U.S. (1966). In this case the Secretary produced each of the vidual Complainants as witnesses who testified concerning r interim earnings. While some of this testimony is e and imprecise, Respondents have produced no contra- ory evidence. Accordingly I accept the testimony of the vidual Complainants as to their interim earnings as best an be reconstructed. Where there is any uncertainty I accepted the larger amount of interim earnings thereby

amounts of unemployment compensation and food stamps. These amounts are not however generally considered to be "earnings" to be deducted from backpay awards. Boitch v. FMSHRC and Neal, 704 F.2d 275 (6th Cir. 1983); N.L.R.B. v. Marshall Field and Company, 318 U.S. 253, 255 (1943); N.L.R.B. v. Gullett Gin Company, 340 U.S 361, 369 (1951).

JAMES CORBIN

$1,000 should be deducted as interim earnings for amounts James Corbin received in 1984 from Dick Hall who was apparantly superintendent of a now defunct coal mine operator. Although Corbin concedes that this amount was paid for work performed during 1984 he maintains that it was a "loan" from Dick Hall to cover a "cold check" issued by the mine operator. Since the "loan" apparently does not have to be repaid until the mine operator finally makes good on his check to Corbin and since there is no formal evidence of debt I consider this amount as interim earnings to be deducted from the backpay award.

During the first quarter of 1985, James Corbin earned $1,800 from the Girdner Mining Company. During the second quarter of 1985 he earned $500 at the A.A. Coal Company and $600 at the Fair Lady Coal Company. He earned $2,400 at the Big Fanny Coal Company during the third quarter of 1985, and during the fourth quarter of 1985 he received $560 for work performed for Junior Helton. As of the date of hearing he continued to work for Junior Helton and presumably continued to earn a maximum of $350 per week.

ROBERT CORBIN

It is not disputed that Robert Corbin had no interim earnings during 1984. The evidence shows that in the first quarter of 1985 he earned $1,449 from the Girdner Mining Company and that during the second quarter 1985 he earned $1,466 from the Fair Lady Coal Company. Thereafter, and presumably during the third quarter of 1985, Robert Corbin worked part time at the Ellison Funeral Home as a grave digger earning $1,500. During the fourth quarter of 1985 he earned $1,800 from the H & R Coal Company and as of the date of hearing continued to work for this company at $300 per week.

A. C. TAYLOR

According to check stubs in evidence, Mr. Taylor had net interim earnings from the Girdner Mining Company during the

ng Company (Exhibit D-G-4) for that same period. I pt this larger amount as correct. Taylor also earned .47 from the G&S Mining Company during the first quarter 985. He had no earnings during the second and third ters of 1985. During the fourth quarter of 1985 com- ing October 21, 1985, he was earning $350 per week. He inued to earn that amount through the date of the ing.

ORDER

Within the framework of the findings in this decision Secretary is directed to compute the total amount of ges and interest through January 31, 1986, to be awarded individual Complainants in this proceeding. Those itations shall be filed with the undersigned on or before ury 25, 1986. The Secretary is also directed to file a us report on or before January 25, 1986, concerning the statement of James and Robert Corbin. This decision is a final disposition of these proceedings and such a osition will not be made until the issues of costs, ges, interest, reinstatement and the amount of civil .ty are finally resolved.

Gary Melick
Administrative Law Judge

ribution:

.e M. Fernandez, Esq., Office of the Solicitor, U.S. rtment of Labor, 280 U.S. Courthouse, 801 Broadway, ville, TN 37203 (Certified Mail)

. Millward, Jr., Esq., P.O. Box 645, Barbourville, KY (Certified Mail)

s R. Morris, Esq., P.O. Box 1008, Barbourville, KY 40906 ified Mail)

FEB 7 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. SE 85-59
	:	A.C. No. 01-00758-03626
v.	:	
	:	Docket No. SE 85-60
JIM WALTER RESOURCES, INC., Respondent	:	A.C. No. 01-00758-03627
	:	
	:	No. 3 Mine

DECISIONS

Appearances: George D. Palmer, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Petitioner; Robert Stanley Morrow and Harold D. Rice, Esqs., Jim Walter Resources, Inc., Birmingham Alabama, for Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for alleged violations of mandatory safety standard 30 C.F.R. § 75.1403 and 75.1403-8(d).

The respondent filed timely answers contesting the proposed civil penalties and hearings were held in Birmingham, Alabama. The parties waived the filing of posthearing proposed findings and conclusions. However, all oral arguments made by counsel on the record during the course of the hearings have been considered by me in the adjudication of these cases.

Issue

The principal issues presented in these proceedings are (1) whether the safeguard provisions found in 30 C.F.R. § 75.1403, and the criteria which follow in sections 75.1403-(b)(3) and 75.1403-8(d) are advisory or mandatory requirements, and (2) whether the respondent's failure to comply with the terms of the safeguard notices issued in these cases constitutes a violation of mandatory safety standards for which civil penalties may be assessed.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to the following:

1. The respondent is the owner and operator of the subject mine.

2. The respondent and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction in these cases.

4. The MSHA Inspectors who issued the subject orders or citations were authorized representatives of the Secretary.

5. A true and correct copy of the subject citations were properly served upon the respondent.

6. The copy of the subject citations and determination of violations at issue are authentic and may be admitted into evidence for purpose of establishing their issuance, but not for the purpose of establishing the truthfulness or relevance of any statements asserted therein.

these cases will not affect the respondent's ability to do business.

8. The alleged violations were abated in good faith.

9. The respondent's history of prior violations is average.

10. The respondent is a medium-size operator.

Discussion

The violations in issue in these proceedings are as follows:

Docket No. SE 85-59

Section 104(a) "S&S" Citation No. 2310757, was issued at 10:00 a.m., on June 15, 1984, and it cites a violation of mandatory safety standard 30 C.F.R. § 75.1403-8(d). The condition or practice is described as follows:

> The clearance along the section 007-0 track was obstructed by 2 timbers laying along the track and a material car loaded with timbers that was hanging out over the straight track over which men and materials are transported. The timbers on the supply car was (sic) hanging out over the man bus that was operating on the straight track. L. A. Holified park (sic) the timber car in the kick back under the direct supervision and instruction of supervisor Earnest Warren. This violation is a part of 107 A Order No. 2310756 so no abatement time is set.

Docket No. SE 85-60

Section 104(a) "S&S" Citation No. 2483944, was issued at 8:35 a.m., on January 22, 1985, and it cites a violation of mandatory safety standard 30 C.F.R. § 75.1403. The condition or practice is described as follows: "The No. 7 man bus being used to transport seven miners from the No. 8 section was not equipped with an operative sanding device in that the reservoirs were empty and sand passed through the lines on the track when the bus was parked."

Petitioner's Testimony and Evidence - Docket No. SE 85-59

Luther McAnally testified that he is a retired former MSHA inspector, and he confirmed that he issued an imminent danger order and a citation in this case on June 15, 1984. He stated that a material car loaded with timbers was parked in a "kick back" along the track in question. The loaded timbers were protruding over the track and two timbers were lying on the ground and touching the ties over which the track was laid.

Mr. McAnally stated that he was in a track jeep with the company safety inspector, a mine safety committeeman, and the jeep operator, and as the jeep travelled along the track it passed close to the protruding timbers, and in fact "bumped" the timbers as the jeep came to a stop. Mr. McAnally stated that he had to scramble and move over in his seat to avoid being struck by the timbers, but that the jeep operator who was seated at the controls in an enclosed cab had no room to move in the event the jeep continued and struck the timbers. The operator's cab was approximately 6 to 7 inches off the rail, and Mr. McAnally believed that the operator would have suffered serious injuries had he been struck by the timbers. With respect to the two timbers lying by the track, Mr. McAnally believed they presented a hazard since they obstructed the rail and were not clear of the jeep travelway.

Mr. McAnally stated that he issued an imminent danger order to isolate the cited hazardous kick back area where the timbers were located and to remove the occupants of the jeep from further exposure to the obstruction hazard. He confirmed that he issued the section 104(a) citation at the same time in order to cite a violation of section 75.1403(8)(d), and to achieve abatement of the condition. He confirmed that he relied on a previously issued safeguard notice, No. T.J.I. issued by MSHA Inspector T. J. Ingram on July 27, 1976, to support his citation (exhibit G-1) (Tr. 18-24).

On cross-examination, Mr. McAnally confirmed that he and the other individuals in the man trip jeep were the only individuals exposed to the hazard resulting from the cited conditions. He stated that his principal duties as an inspector entailed the inspection of mines and the enforcement of mandatory safety standards. He denied that his duties included the rendering of advice to mine operators or miners.

the official files in his office (Tr. 27-33).

Petitioner's counsel confirmed that the 1976 safeguard notice relied on by Inspector McAnally makes reference to several locations along the track haulageway where the clearance was less than 24 inches. The notice also makes reference to an obstructed clearance in a walkway in that refuse, loose rock, and supplies were present. He also confirmed that the conditions cited by Mr. McAnally must be substantially the same kind of conditions described in the original safeguard notice. His position is that since Mr. McAnally found there was no track clearance, or less than 24 inches of clearance because of the protruding timbers, his reliance on the prior notice was proper (Tr. 35-36). Inspector McAnally confirmed that there are no other specific mandatory standards covering the conditions he cited, and if there were, he would have cited another appropriate standard rather than relying on the safeguard notice (Tr. 36).

MSHA Inspector T. J. Ingram confirmed that he issued a safeguard notice at the No. 3 Mine on July 27, 1976, exhibit G-1, and stated that he did so after finding the main track haulageway cluttered along a tight curve going north along a track haulageway. The required track clearance was less than the required 24 inches. Mr. Ingram confirmed that he served the notice on Ken Price, the respondent's safety inspector, and that he discussed with him the cited conditions as well as what was required to abate the conditions (Tr. 40).

On cross-examination, Mr. Ingram confirmed that he has rendered advice to miners and management personnel in the mines with respect to safety practices. He also confirmed that he has pointed out violative conditions during his inspections, and that his advice and recommendations, while not mandatory, are freely given as part of his inspection duties (Tr. 40-43).

In response to further questions, Mr. Ingram stated that once a safeguard notice is issued, an inspector may rely on it in future inspections where he issues citations or orders. He confirmed that the notice he issued on July 27, 1976, is still in effect at the No. 3 Mine, and that in the event he finds an obstructed clearance on the track haulageway, he would issue a citation and rely on that notice. He confirmed that there is no way that a mine operator can be relieved of the requirements of a safeguard notice, and he believed that

During the course of the hearing, I took note of the t that subsequent to the time Mr. McAnally issued his cita- n of June 15, 1984, another MSHA inspector (Theron E. ker) modified the citation on October 3, 1984, (copy in adings), to delete the "initial action" shown on item 14 the citation form. Item 14 is the place on the form where pector McAnally made reference to Mr. Ingram's safeguard ice of July 27, 1975.

Mr. McAnally had no knowledge of the modification issued Inspector Walker (Tr. 46). When asked to explain this ification, MSHA Counsel Palmer stated that Mr. Walker prob- y intended to modify the section 107(a) order issued by pector McAnally at the time he issued his separate section (a) citation, but did not distinguish the two (Tr. 47). nsel asserted that notwithstanding the deletion by Inspec- Walker, the respondent had adequate notice of the require- ts of the safeguard notice relied on by Inspector McAnally, that the citation issued by Mr. McAnally specifically made erence to that safeguard notice. Counsel concluded that deletion is immaterial to the issue presented in this e, and he maintained that the respondent had adequate ice as to what was required by the safeguard notice at the e it was issued by Mr. McAnally and up to and including the e of abatement (Tr. 48).

Respondent's counsel could offer no explanation for the etion, and his position is that Mr. McAnally's citation t stand or fall on the question of whether the safeguard vided adequate notice to the respondent as to what was uired to achieve compliance (Tr. 49). Counsel's position that the safeguard notice is inadequate to change it into andatory standard requirement (Tr. 49).

itioner's Testimony and Evidence - Docket No. SE 85-60

Petitioner's counsel stated that the inspector who ued Citation No. 2483944, Steve J. Kirkland, was out of State on other MSHA business and was not available to tify in this proceeding. However, the parties stipulated t the facts alleged in Citation No. 2483944 occurred as eged. They also stipulated that the civil penalty factors set forth in section III of the citation (negligence, grav- , and good faith), and on the second page of the proposed essment (MSHA Form 1000-179), are properly evaluated.

MSHA inspector Thomas Meredith confirmed that he issued safeguard Notice No. I T.L.M. on October 19, 1976, at the respondent's No. 3 Mine and that he served it on the respondent's mine safety inspector Ken Price. Mr. Meredith stated that he discussed the notice with Mr. Price, explained the conditions referred to therein, and advised him what had to be done to insure future compliance with the notice (exhibit G-1).

Mr. Meredith stated that the previous 1976 MESA safeguard notice form did not provide for a reference to the particular safeguard section, such as section 75.1403-6(b)(3), and that he simply referred to section 75.1403, Subpart O, and described the specific safeguard as "adequate and operative sanding devices."

On cross-examination, Mr. Meredith confirmed that in his capacity as an MSHA inspector he often gives advice to miners concerning mine safety conditions or practices. He also confirmed that he gave the respondent a reasonable amount of time to abate the conditions described in his safeguard notice and that he issued several extensions to afford the respondent an opportunity to correct the conditions (Tr. 75-77).

Petitioner's exhibit G-2, consists of copies of previously issued section 104(a) citations issued at the No. 3 Mine (Tr. 79), and they are as follows:

> Citation No. 0748974, September 26, 1979, 30 C.F.R. § 75.1403. The No. 7 personnel carrier being used on material and mantrip haulage system was not provided with operating sanding device. Safeguard No. 1 T.L.M. dated 10-19-76.
>
> Citation No. 0748973, September 26, 1979, 30 C.F.R. § 75.1403-6(b)(3). The No. 13 personnel carrier being used on material and mantrip haulage system was not provided with operating sanding device. Safeguard No. 1 T.L.M. dated 10-19-76.
>
> Citation No. 0748972, September 26, 1979, 30 C.F.R. § 75.1403-6(b)(3). The No. 11 personnel carrier being used on material and mantrip haulage system was not provided with operating sanding device. Safeguard No. 1 T.L.M. dated 10-19-76.

Respondent's Arguments

The respondent's arguments with respect to the previ issued safeguard notices in these cases are as follows (49-68):

1. The safeguard notice provisions found in section 75.1403, and the criteria which follow with respect to self propelled personnel carriers section 75.1403-6(b)(3), concerning properly installed and well-maintained sanding devices, and section 75.1403-8(d), concerning haulage road clearances are advisory rather than mandatory requirements.

2. The previously issued safeguard notices relied on by the inspectors in these proceedings are general and advisory in nature and fail to specifically put the respondent on notice as to what is required to insure compliance with any applicable mandatory safety standards.

3. The previously issued safeguard notices, on their face, particularly with respect to the printed language on the form (Specific Recommended Safeguards) supports a conclusion that those notices are advisory recommendations rather than mandatory enforceable standards.

4. On the facts presented in these proceedings, the previously issued advisory safeguard notices do not specifically refer to conditions or practices cited by the inspectors in the citations issued in these proceedings.

5. The use of the "advisory" word should rather than the "mandatory" word shall in the prior safeguard notices connote an advisory rather than a mandatory requirement for compliance.

With regard to the previously issued 1979 citations, exhibit G-2, where the inspectors relied on Inspector Meredith's safeguard notice of October 19, 1976, to support violations for the respondent's failure to provide operating sanding devices on its personnel carriers, respondent's counsel asserted that simply because these citations were issued, MSHA may not "bootstrap" the safeguard notice and transform it into a mandatory standard (Tr. 57). When asked whether or not these prior citations were contested, respondent's counsel replied that he was not in the respondent's employ at that time, and that mine management would rather pay the civil penalties rather than "make an inspector mad" (Tr. 58). He also asserted that citations are sometimes paid out of ignorance or "they get caught up in the paperwork" (Tr. 66).

Respondent's counsel conceded that an adequately written safeguard notice may become a mandatory standard on a mine-by-mine, case-by-case basis (Tr. 58). Counsel does not dispute the facts as stated on the face of the citations issued in these proceedings. His argument is that the safeguard notices used by the inspectors to support the citations are inadequate and do not put the No. 3 Mine on notice as to what is required to maintain compliance. Counsel is of the view that the safeguards are advisory opinions rather than mandatory standard requirements (Tr. 59). In support of these arguments, counsel cited the case of Secretary of Labor v. Pittsburgh-Des Moines Steel Company and OSHRC, 584 F.2d 638 (3d Cir. 1978), to support his argument that the use of the word "should" in regulatory safety and health rules are viewed only as recommendations and not as mandatory standards (Tr. 50, 59).

Counsel argues that since MSHA inspectors provide advice and recommendations to mine operators in the course of their inspections, the use of the word "should" in the safeguard notices fails to adequately put the operator on notice as to what is actually required of him in terms of compliance. In short, counsel argues that the inspectors failed to adequately differentiate what is mandatory and what is advisory (Tr. 51). Counsel conceded that had the inspectors who issued the safeguard notices used the word "shall" rather than "should," and made it clear that it was a mandatory requirement, he would concede that adequate mandatory notice has been given to the respondent (Tr. 59-60).

In further support of his arguments, respondent's counsel requested that I take judicial notice of my decisions in Monterey Coal Company v. MSHA, LAKE 83-67, LAKE 83-78, and

LAKE 83-84, decided February 23, 1984, 6 FMSHRC 424, as well as the following decisions: MSHA v. Jim Walter Resources, Inc., BARB 78-652-P, September 4, 1979, 6 FMSHRC 1317 (J. Michels); Consolidation Coal Company v. MSHA, WEVA 79-129-R, July 31, 1980, 2 FMSHRC 2021 (J. Cook; MSHA v. Jim Walter Resources, Inc. and Cowin and Company, BARB 77-266-P and BARB 76-465-P, November 6, 1981, 3 FMSHRC 2488 (Commission); and MSHA v. U.S. Steel Mining Company, Inc., PENN 82-13 and PENN 83-57-R, March 29, 1982, 4 FMSHRC 526 (J. Merlin).

Findings and Conclusions

30 C.F.R. § 75.1403 repeates section 314(b) of the Act and provides as follows: "Other safeguards adequate, in the judgment of an authorized representative of the Secretary, t minimize hazards with respect to transportation of men and materials shall be provided."

Section 75.1403-1 provides:

> (a) Sections 75.1403-2 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under section 75.1403. Other safeguards may be required.
>
> (b) The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to section 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.
>
> (c) Nothing in the sections in the section 75.1403 series in this Subpart O precludes the issuance of a withdrawal order because of imminent danger.

In Southern Ohio Coal Company, (SOCCO), 7 FMSHRC 509 (April 1985), the Commission noted that the safeguard provisions of the Act confer upon the Secretary "unique authority to promulgate the equivalent of mandatory safety standards

of the hazard at which it is directed and the conduct required of the operator to remedy such hazard." In short, the operator must have clear notice of the conduct required of him.

In SOCCO, an inspector issued a citation after finding water 10 inches in depth from rib to rib at a stopping loca along a belt conveyor. Because of the presence of the wate the inspector believed that a clear travelway of 24 inches not provided along the conveyor belt as required by a previously issued safeguard notice. The safeguard notice was issued after the inspector found fallen rock and cement blo at three locations along a conveyor belt. Addressing the q tion as to whether the safeguard notice referencing "faller rock and cement blocks at three locations," and requiring 24 inches of clearance on both sides of the conveyor belt, should have put SOCCO on notice that conditions such as the water described in the citation fell within the safeguard's prohibitions, the Commission concluded that it did not. In this regard, the Commission stated as follows at 7 FMSHRC:

> Given the frequency of wet ground conditions in the mine, and the basic dissimilarity between such conditions and solid obstructions such as rocks and debris, we find that SOCCO was not given sufficient notice by the underlying safeguard notice issued in 1978 that either wet conditions in general or the particular conditions cited in 1983 by the inspector in this case would violate the underlying safeguard notice's terms.
>
> We do not hold that a safeguard notice pertaining to hazardous conditions caused by wetness could not be issued. Conditions such as those cited by the inspector here, if hazardous, can just as readily be eliminated by issuance of safeguard notices specifically addressing such conditions. By taking this approach rather than bootstrapping dissimilar hazards into previously issued safeguard notices, the operator's right to notice of conditions that violate the law and subject it to penalties can be protected with no undue infringement of the Secretary's authority or loss of miner safety.

In a footnote at 7 FMSHRC 512, the Commission made the lowing observation: "The requirements of specificity and row interpretation are not a license for the raising or ptance of purely semantic arguments . . . . We recognize safeguards are written by inspectors in the field, not team of lawyers."

In Secretary of Labor v. U.S. Steel Mining Company, Inc., SHRC 526, 529-530, (March 1982), Chief Judge Merlin made following observations with respect to section 75.1403 guard notices:

> * * * Safeguards are designed to cover situations where conditions vary on a mine-to-mine basis. Mandatory standards cannot anticipate every possible physical condition in every mine and therefore with respect to the transportation of men and materials the Act allows flexibility. By means of a safeguard MSHA can impose certain requirements on a particular mine which are peculiar to that mine because of its physical configuration and circumstances. However, in order to be fair to the operator by giving due notice, the requirements being imposed upon its mine are set forth first in the safeguard notice which carries no civil penalty. Only in the subsequent citation based upon the safeguard can a penalty be imposed. In the area of transportation of men and materials, safeguards embody and effectuate flexibility and adaptability to individual circumstances in the administration of the Act. However, the potential scope of safeguards is very broad and accordingly, care must be taken to ensure that they are employed only in the proper context and do not become a means whereby the normal rule-making process is ignored and circumvented.

In Secretary of Labor v. Jim Walter Resources, Inc., ket No. SE 84-23, 6 FMSHRC 1815, July 30, 1984, Chief Judge lin affirmed a citation issued to the respondent for a violon of section 75.1403-8(d), for failing to keep its track arance free of rails, crib blocks, and timbers. The pector who issued the violation relied on the same safeed notice used by the inspector in the instant Docket No. 85-59. In affirming the violation, Judge Merlin ruled that cited safeguard criteria "is plainly mandatory and the

tion and judicial application," 7 FMSHRC 1910. Judge Merlin's decision with respect to the citation was not appealed. His ruling vacating another citation involving a safeguard notice for a belt conveyor was reversed by the Commission in a decision issued on April 29, 1985, 7 FMSHRC 493.

I believe a reading of the Commission's "safeguard notice" decisions makes it clear that adequately written safeguards are mandatory standards or requirements which are enforceable on a mine by mine basis, and the respondent concedes that this is the case (Tr. 58). Respondent's argument that safeguard notices are "advisory opinions" by an inspector and therefore unenforceable is rejected. Simply because an inspector may give advice or make recommendations to a mine operator while in the mine during an inspection does not mean that the subsequent use of the word "should" on the face of any safeguard notice that he may issue renders the safeguard less than mandatory or unenforceable.

In the instant cases, the inspectors who issued the safeguards simply included the specific language of the regulatory criteria found in sections 75.1403-6 and 75.1403-8, as part of the safeguard notice. Since the criteria use the word "should," it was included as part of the safeguard. However, the safeguard form makes it clear to me that the respondent was required to comply with its terms, and I construe it to be a directive and not simply advice. Although the form contains the words "recommended safeguards," the words "Notice to Provide Safeguards" is in bold print, and the operator is put on notice that the inspector who inspected his mine directs him to comply with the safeguards as stated on the face of the form. The operator is also put on notice that his failure to comply with the safeguard will result in the issuance of a withdrawal order. Under the circumstances, the respondent's assertion that the safeguards issued in these cases were simply advisory recommendations by the inspectors rather than enforceable mandatory requirements is rejected.

The respondent's suggestion that the use of the word "should" in the regulatory criteria found in sections 75.1403-6 and 75.1403-8 render them advisory and unenforceable as mandatory standards is rejected. Section 75.1403, which is a statutory provision, mandates that adequate safeguards to minimize transportation hazards shall be provided, and section 75.1403-1 provides the mechanism and framework for notifying an operator as to the specific safeguard requirements which it is expected to follow for its mine. I conclude and find that the regulatory safeguard criteria in

question are intended to be construed as mandatory rath
than advisory requirements.

In Secretary of Labor v. Jim Walter Resources, Inc
Cowin and Company, 3 FMSHRC 2488 (November 1981), the
Commission held that 30 C.F.R. § 77.1903(b), was not a
tory safety standard imposing a mandatory duty on a min
ator. The standard required that certain ANSI specific
for the use of wire ropes used for hoisting in a mine b
followed, and it mandated that these specifications sha
used as a guide in the use, selection and maintenance o
ropes. The Commission determined that the phrase "shal
used as a guide" was, at best, ambiguous. It noted tha
standard contained mandatory language, i.e., "shall be
but took note of the fact that the requirement imposed
the use of ANSI standards "as a guide." The Commission
cluded that in common usage a "guide" was something les
a mandatory requirement to be followed, and in view of
ambiguous regulatory language, as well as the ambiguous
nature of many of the underlying ANSI standards, it con
that the Secretary's attempt to derive an enforceable m
tory duty from the standard to be unreasonable. The
Commission found fault with the wording of the standard
concluded that it did not adequately inform an operator
duty that must be met.

While it is true that the language found under the
eral safeguard regulatory criteria found in section
75.1403-1(b), states that an inspector relying on the c
ria set out in sections 75.1403-2 through 75.1403-11, w
guided by those criteria in requiring other safeguards
mine-by-mine basis, the fact is that the criteria enume
in those sections specifically delineate what is requir
compliance. Unlike the ambiguous ANSI standards, I can
conclude that the safeguard criteria suffer from any am
They specifically address the particular subject matter
ered by each of the criteria sections.

Fact of Violation - Docket No. SE 85-60 - Citation No.

In this case, the respondent is charged with a fai
to maintain an operative sanding device on a man bus us
transport seven miners from the section. The safeguard
criteria for personnel carriers found at 30 C.F.R.
§ 75.1403-6(b)(3), requires that such carriers be equip
with properly installed and well-maintained sanding dev
The inspector found that the sanding device reservoirs
the cited bus were empty and that the sand passed throu

abated when the bus was removed from the mine in order to repair the sanding device.

The previously issued safeguard notice, 1 T.L.M., is by Inspector Meredith on October 19, 1976, states as fol

> The B-1 mantrip bus and the J-1 also (sic) J-2 Jitneys used to haul men as mantrip jitneys were not provided with operative sanding devices.
>
> Self-propelled personnel carriers should be equipped with properly installed and well maintained sanding devices, except that personnel carriers (Jitneys), which transport not more than 5 men, need not be equipped with such sanding devices.

The requirements of the safeguard criteria found in tion 75.1403-6(b)(3), for personnel carriers provides as follows:

> (b) * * * [E]ach track-mounted self-propelled personnel carrier should:
>
> * * * * * * *
>
> (3) Be equipped with properly installed and well-maintained sanding devices, except that personnel carriers (jitneys), which transport not more than 5 men, need not be equipped with such sanding device; * * *

In issuing the citation in this case, the inspector relied on a previously issued safeguard notice issued by Inspector Meredith on October 20, 1976, at the No. 3 Mine The inspector who issued the citation cited a violation o the general safeguard provisions of 30 C.F.R. § 75.1403, he did not include any reference to the specific criteria requirements found in section 75.1403-6(b)(3). However, did describe in detail the specific condition for which t citation was issued, and as indicated earlier, the man bu was removed from service so that the sanding device could repaired.

When the original safeguard notice was issued in 19 Inspector Meredith noted that one man bus and two jitneys

devices." Mr. Meredith did not specify the specific conditions which rendered the sanding devices less than operative, and while his notice makes no regulatory reference to section 75.1403-6(b)(3), and simply cited section 75.1403, Mr. Meredith included a verbatim quote of the criteria requirements on the face of the notice. Mr. Meredith explained that he omitted any reference to section 75.1403-6(b)(3), because the citation forms in use in 1976 did not provide a space for this reference, and only provided for a citation to the regulatory section and subpart i.e., Sec. 75.1403, Subpart O.

During the course of the hearing, MSHA's counsel conceded that the conditions cited in the citation issued in this case must be substantially the same kind of conditions that were described in the original safeguard notice (Tr. 35). He stated that the only issue presented here is whether or not the citation provided the respondent with adequate notice as to what he had to do to maintain compliance. As long as the respondent is on notice that a safeguard notice is in effect, the requirements of the law have been met (Tr. 48).

With regard to the lack of reference to the specific safeguard criteria dealing with mantrips as found in section 75.1403-6(b)(3), MSHA's counsel asserted that anyone in the mining industry is presumed to be familar with the general mandatory requirements of sections 75.1403 and 75.1403-1, as well as the enumerated criteria which follow, and that these must be considered collectively as mandated requirements which must be followed. In support of his position, MSHA's counsel pointed out that the respondent had previously received citations in September 1979, for violations of section 75.1403, because of the lack of operative sanding devices on its personnel carriers in the No. 3 Mine, and in each instance the inspector who issued those citations made reference to the previously issued October 19, 1976, safeguard notice issued by Inspector Meredith. Since those citations were not contested by the respondent, counsel argued that respondent was on notice as to the mandatory requirements of the safeguards, and had adequate notice as to the requirements in question (Exhibit G-2, Tr. 55).

I take note of the fact that in each of the previously issued citations in 1979, the inspector initially failed to cite a violation of section 75.1403-6(b)(3), and simply cited section 75.1403 as the violative regulatory section. However, he subsequently modified the citations to show a violation of section 75.1403-6(b)(3), rather than section 75.1403. I also note that in all three instances, the inspector failed

to detail what was wrong with the sanding devices and simply stated that the mantrips were not provided with an operating sanding device. Further, in his narrative findings concerning the gravity of the violations, the inspector indicated that in the event the personnel carriers "hit a wet rail or slick spot it needed something to slow it down," and that if it hit a slick spot it could "get out of control." Abatement was achieved by providing the cited carriers with "operating sanding devices."

In Secretary of Labor v. Mathies Coal Company, 4 FMSHRC 1111 (1982), Judge Lasher affirmed a citation which was issued for a violation of 30 C.F.R. § 75.1403. The citation was based on the inspector's finding that one of four sanding devices provided for a self-propelled personnel carrier was inoperative. The inspector described the "inoperative" sander as follows: "The sander was empty due to valve that was stuck open." The underlying safeguard notice relied on by the inspector required that "all mantrips be provided with properly maintained sanding devices sufficient to sand all wheels in both directions of travel." Although an appeal was taken on Judge Lasher's "significant and substantial" finding, his ruling on the fact of violation was not appealed. The Commission subsequently affirmed Judge Lasher's decision, 6 FMSHRC 1 (1984).

The criteria language found in section 75.1403-6(b)(3), requires that personnel carriers be equipped with properly installed and well-maintained sanding devices. Although the term "well maintained" is rather general, Webster's New Collegiate Dictionary defines the word "maintain" in pertinent part as "to keep in an existing state (as of repair, efficiency); preserve from failure or decline (machinery); to sustain against * * * danger; * * *." In the instant case, the respondent does not dispute the fact that the sanding device in question was not in an operative condition at the time it was cited by the inspector. It seems obvious to me that the failure of the sanding device reservoir to retain its supply of sand while the bus was parked rendered it less than operative, and I find that the failure to insure that the sand did not escape from the reservoir supports a conclusion that the sanding device was not well maintained. Had the bus been placed in operation with no sand in its sanding device reservoir, it seems logical to me that the sanding device would be useless.

While it is true that the inspector who issued the disputed citation in this case failed to refer to section 75.1403-6(b)(3), on the face of the citation, he did cite

guard notice issued on October 19, 1976. In addition, by specifically describing the condition which rendered the sa ing device less than operative, the respondent was put on notice as to what was required to correct the condition. T safeguard notice, as well as the intervening citations, should have alerted the respondent of the requirement for maintaining operative sanding devices on its personnel carriers.

I conclude that the safeguard notice, coupled with the subsequently issued violations which were not contested, ad quately informed the respondent as to the requirements for maintaining the sanding devices on its personnel carriers i an operative condition. Although the prior inspectors shou have detailed the particular conditions which rendered the previously cited sanding devices inoperative, as did the inspector who issued the citation in this case, the fact th they did not do so does not render the citation or the safe guard notice less than adequate to inform the respondent as to what it was required to do. The prior violative condi- tions were abated, and I conclude that the "inoperative san ing device" condition cited in this case was substantially the same as the condition cited in the original safeguard notice, and in both instances the sanding devices were repaired so as to render them operative. Under the circum- stances, I conclude and find that a violation has been esta lished, and the citation IS AFFIRMED.

Fact of Violation - Docket No. SE 85-59 - Citation No. 2310

In this case, the respondent is charged with a failure to provide adequate clearance on a track section over which men and materials were transported. The inspector found tw timbers lying along the track, and he found a material car parked in the track "kick-back" which was loaded with timbe which hung over a man bus that was operating on the track. The inspector relied on a previously issued safeguard notic and cited a violation of the track haulage road safeguard criteria found in section 75.1403-8(d), which provides as follows: "(d) The clearance space on all track haulage roads should be kept free of loose rock, supplies, and othe loose materials."

The criteria found in subsection (b) of section 75.1403-8, provides as follows:

> (b) Track haulage roads should have a continuous clearance on one side of at least

the side on which clearance is provided, 24 inches of clearance should be provided on both sides for a distance of not less than 100 feet and warning signs should be posted at such locations.

The previously issued safeguard notice, 1 T.J.I. by Inspector Ingram on July 27, 1976, states as follo

> Several locations along the track haulage-ways that were used for travel had clearance less than 24 inches. Refuse, loose rock and supplys (sic) obstructed the available clearance in the provided walkway. Signs were not provided in places where the clearance side could be changed.
>
> The track haulage roads should have a continuous clearance on one side of at least 24 inches from the farthest projection of normal traffic. Where it is necessary to change the side on which clearance is provided, 24 inches of clearance should be provided on both sides for a distance of not less than 100 feet and warning signs should be posted at such locations.
>
> Track haulage roads developed after March 30, 1970, should have clearance on the "tight" side of at least 12 inches from the farthest projection of the normal traffic. A minimum clearance of 6 inches should be maintained on the "tight" side of all track haulage roads developed prior to March 30, 1970.
>
> The clearance space on all track haulage roads should be kept free of loose rock, supplies and other loose materials.

The parties advance the same arguments with resp the adequacy of the safeguard notice as those stated previous case. MSHA produced copies of 13 citations order issued at the No. 3 Mine at various times durin 1979, 1981, 1982, 1983, and 1984, for obstructions on respondent's track haulage system. In each instance ing inspectors cited a violation of section 75.1403-8 (d), and with one exception, the inspectors relied on

previously issued safeguard notice issued by Inspector Ingram. The variety of conditions cited include track obstructions caused by crib blocks, loose rock, chain link fencing materials, concrete blocks, pipe, rails, trash, and in 10 cases loose timbers were included among the materials cited for the obstruction of the track or the failure to maintain the required clearances noted in the safeguard notice. In each instance, the violations were abated by the cleanup and removal of the materials.

Although the safeguard notice issued by Inspector Ingram makes reference to an obstructed walkway along the mine track haulageways, and makes no specific reference to section 75.1403-8(d), it specifically required that adequate clearances be maintained along the track haulage, and that the track haulage roads be kept free of loose rock, supplies and other loose materials. Mr. Ingram testified that he issued the safeguard after finding the main track haulageway cluttered and the clearance side of the track obstructed, and he confirmed that he discussed the matter with the respondent's safety inspector (Tr 39-40). Mr. Ingram also confirmed that the safeguard notice is still in effect at the mine, and that he would continue to rely on it in issuing citations for conditions similar to those stated in the safeguard (Tr. 44).

I conclude and find that the timbers which obstructed the cited track area in question in this case fall within the category of supplies or other loose materials noted in section 75.1403-8(d), and that they were conditions similar to the conditions cited in the safeguard. Respondent does not dispute the existence of the timbers, nor does it dispute the fact that the protruding timbers obstructed the track. Inspector McAnally's testimony, which I find credible, establishes that the timbers not only obstructed the track, but that the man bus "bumped" the timbers, and Mr. McAnally had to contort his body to avoid being struck by the protruding timbers. Respondent offered no testimony or evidence to rebut Mr. McAnally's testimony.

MSHA's counsel argues that it is clear from the record that the track area in question was obstructed, and that since Mr. McAnally found that there was no track clearance, or less than 24 inches of clearance because of the protruding timbers, his reliance on the previously issued safeguard notice was proper (Tr. 35-36).

I conclude that the safeguard notice issued by Inspector Ingram, as well as the citation issued by Mr. McAnally relying on that safeguard, adequately informed the respondent as

to what was required to maintain compliance with the cited regulatory standard. I take particular note of the fact that the citations issued subsequent to the safeguard notice included specific references to timbers which obstructed the track haulageways in the No. 3 Mine, and in each instances respondent corrected the conditions hy removing the materials. I find nothing in this record to suggest that the respondent was confused as to the requirements of the safeguard relied on by Mr. McAnally, nor do I find any hasis for concluding that the safeguard was other than adequate. Under the circumstances, I conclude and find that a violation has been established, and the citation IS AFFIRMED.

Significant and Substantial Violations

Citation No. 2483944

In arriving at his decision that the inoperative sanding device violation in the Mathies Coal Company case, supra, was "significant and substantial," Judge Lasher discussed in some detail the conditions which prevailed at the time the citation was issued. Judge Lasher made credibility findings and resolved disputed testimony concerning the track curves, grades, whether the tracks were wet, the braking capacity of the mantrip, the mechanics of the sanding device, etc., and the Commission affirmed his findings in this regard.

In the instant case, the inspector who issued the sanding device citation was unavailable for trial because he was out of state on other MSHA business. Under the circumstances, there is no testimony or evidence as to the actual underground conditions which prevailed at the time the citation was issued. Although the parties stipulated to the fact that the sanding device was inoperative, and that the inspector was correct when he marked the gravity portion of the citation "reasonably likely," and "lost workdays or restricted duty," there is no factual or evidentiary basis to support the inspector's "significant and substantial" finding. Under the circumstances, I conclude that the petitioner has failed to establish that the violation was "significant and substantial," and the inspector's finding in this regard IS VACATED.

Citation No. 2310757

The testimony and evidence in this case establishes that the parked protruding timbers obstructed the track and posed a hazard to the miners who were riding in the man bus. The inspector's unrebutted testimony established that the bus "bumped" the timbers and that the inspector had to move to

ing along the track. Accordingly, the inspector's "significant and substantial" finding IS AFFIRMED.

History of Prior Violations

The petitioner filed no information concerning the respondent's history of prior violations. Although the parties stipulated that the respondent has an "average" history of prior violations, I have no idea what this means. Accordingly, for purposes of any civil penalty assessments for the citations, I cannot conclude that the respondent's compliance history warrants any additional increases or decreases. In the future, the petitioner will be expected to make some meaningful input with respect to this statutory standard.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Continue in Business

The parties stipulated that the respondent is a medium-size operator and that the imposition of civil penalties will not affect its ability to continue in business. I adopt these stipulations as my findings and conclusions on these issues.

Good Faith Abatement

The parties stipulated that the cited conditions were abated in good faith by the respondent. I agree and conclude that the respondent exercized good faith in abating the violations.

Negligence

I conclude and find that the respondent knew or should have known of the requirements for maintaining an obstruction-free track and insuring that its personnel carrier sanding device was in operative condition. The safeguard notices, as well as the subsequently issued citations, provided ample notice to the respondent as to what was expected to maintain compliance with the cited standards. I conclude and find that the respondent was negligent, and that the violations resulted from the failure by the respondent to exercise reasonable care In view of the number and frequency of violations [illegible] because of timbers and other clutter on its track system, it

would appear to me that the respondent has given adequate attention to its preventive measures in this regard.

Gravity

I conclude and find that the sanding device citation was serious. The lack of an operative sanding device would obviously affect the safe operation of the man bus. The obstructed track posed a serious hazard to the men riding the track in a man bus, and I consider this violation to be extremely serious.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude that the following civil penalty assessments are appropriate and reasonable for the citations which have been affirmed:

Docket No. SE 85-60

Citation No. 2483944, January 22, 1985, 30 C.F.R. § 75.1403--$150.

Docket No. SE 85-59

Citation No. 2310757, June 15, 1984, 30 C.F.R. § 75.1403-8(d)--$600.

ORDER

The respondent IS ORDERED to pay the assessed civil penalties within thirty (30) days of the date of this decision. Payment is to be made to MSHA, and upon receipt of same, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

Department of Labor, 2015 Second Avenue North, Suite 201, Birmingham, AL 35203 (Certified Mail)

Robert Stanley Morrow, Esq., Jim Walter Resources, Inc., P.O. Box C-79, Birmingham, AL 35283 (Certified Mail)

Harold D. Rice, Esq., Jim Walter Resources, Inc., P.O. Box C-79, Birmingham, AL 35283 (Certified Mail)

H. Gerald Reynolds, Esq., Jim Walter Corporation, P.O. Box 22601, Tampa, FL 33622 (Certified Mail)

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FALLS CHURCH, VIRGINIA 22041

FE

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDIN
	:	Docket No. LAKE 86-11
	:	A.O. No. 33-00968-0362(
v.	:	Nelms No. 2 Mine
YOUGHIOGHENY & OHIO COAL CO. Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Patrick M. Zohn, Esq., Office of the Solic
Cleveland, Ohio, for the Petitioner
Robert Kota, Esq., Youghiogheny and Ohio
Coal Company, for the Respondent

Before: Judge Maurer

This case is before me upon a petition for assessmen civil penalty under Section 105(d) of the Federal Mine Sa and Health Act of 1977 (the Act). A hearing in this matte was convened in Wheeling, West Virginia on January 8, 198 At that time, the parties advised me of a proposed settle disposition of the dispute and jointly moved for approval of a settlement agreement and dismissal of the case. The violation in this case was originally assessed at $240 an the parties propose to reduce the penalty to $160. I hav considered the representations and documentation submitte in this case, and I conclude that the proffered settlemen is appropriate under the criteria set forth in Section 11 of the Act.

WHEREFORE, the motion for approval of a settlement i GRANTED and it is ORDERED that Respondent pay a penalty o $160 within 30 days of this decision. Upon payment, thes proceedings are DISMISSED.

Roy J. Maurer
Administrative Law Judge

Department of Labor, 1240 East Ninth Street, Cleveland, OH 44199 (Certified Mail)

Robert Kota, Esq., Youghiogheny and Ohio Coal Company, P.O. Box 1000, St. Clairsville, OH 43950 (Certified Mail)

/db

(703) 756-6232

February 13, 1986

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 85-32-D
ON BEHALF OF	:	MSHA Case No. NORT CD 84-7
LARRY COLLINS,	:	
EARL KENNEDY,	:	Mine No. 1
Complainants	:	
v.	:	
	:	
RAVEN RED ASH COAL	:	
CORPORATION,	:	
Respondent	:	

ORDER

During the course of the hearing held in this matter in Abingdon, Virginia, on November 13, 1985, MSHA's counsel offer exhibits C-9 and C-10, which are computer print-outs detailing the respondent's history of civil penalty assessments for the period August 23, 1982 through August 22, 1984. Exhibit C-9 i the compliance record for the respondent Raven Red Ash Coal Corporation, and exhibit C-10 is the compliance record for all mines operated by Mr. David Jordan, President of the Raven Red Ash Coal Corporation.

Respondent's counsel raised an objection to the relevancy and accuracy of the information contained in the exhibits, and he argued that some of the dates reflected on the print-outs a for periods during which the respondent's mine was operated ur a different corporate name, namely the Virginia and West Virgi Coal Corporation. Respondent's counsel raised a question con- cerning the corporate ownership of the Virginia and West Virgi Coal Corporation, and suggested that any prior citations attri butable to that corporate entity should not be considered as p of the history of compliance for the respondent Raven Red Ash Coal Corporation.

I reserved any ruling on the admissibility of exhibits C-9 and C-10, and permitted the parties an opportunity to file further arguments on the questions raised.

has also submitted proposed exhibits C-11, C-12, C-13, and C which are copies of MSHA Legal Identity Reports and related correspondence reflecting Mr. Jordan's corporate ownership a interest in the Virginia and West Virginia Coal Corporation the Raven Red Ash Coal Corporation. Proposed exhibit C-15 i MSHA document explaining the various computer codes and colu headings as shown on the computer print-outs. Counsel reque that all of these exhibits, including the disputed exhibits and C-10, be received in evidence and made a part of the rec in this proceeding.

The respondent has not responded to MSHA's letter of January 9, 1986, and has filed no additional arguments with respect to the history of prior violations issue. By letter dated January 16, 1986, respondent's counsel advised that th respondent will stand on the present record and will not fil any additional briefs in this matter.

Upon due consideration of the submissions made by MSHA' counsel on January 9, 1986, I conclude and find that the inf mation submitted is relevant to this proceeding. In the eve that I find a violation of section 105(c) of the Act has bee established, the respondent's history of prior violations is relevant to any civil penalty assessment which may be assess by me for the violation. Accordingly, MSHA's request to rec exhibits C-9 through C-15 as part of the record in this case GRANTED, and the respondent's objections ARE DENIED.

George A. Koutras
Administrative Law Judge

Distribution:

Sheila K. Cronan, Esq., Office of the Solicitor, U.S. Depart of Labor, 4015 Wilson Boulevard, Room 1237A, Arlington, VA 22203 (Certified Mail)

Daniel R. Bieger, Esq., Copeland, Molinary & Bieger, P.O. Bo Abingdon, VA 24210 (Certified Mail)

/fb

FEB 14 1986

GARY L. LAMB, SR., Complainant	:	DISCRIMINATION PROC
v.	:	Docket No. VA 84-39
	:	MSHA Case No. NORT
PARAMONT MINING CORPORATION, Respondent	:	Docket No. VA 86-1-
	:	MSHA Case No. NORT

ORDER OF DISMISSAL

Before: Judge Melick

The Complainant, Gary Lamb, seeks to withdraw hi plaint in the captioned cases based on a settlement a with Respondent. Under the circumstances herein, per to withdraw is granted. 29 C.F.R. § 2700.11. The ca therefore dismissed.

Gary Melick
Administrative Law Jud

Distribution:

Mr. Gary L. Lamb, Sr., P.O. Box 404, McRoberts, KY 4 (Certified Mail)

Gerald L. Gray, Esq., McClure Avenue, P.O. Box 929, VA 24228 (Certified Mail)

Michael T. Heenan, Esq., and Ronald E. Meisburg, Esq Heenan & Althen, 1110 Vermont Avenue, N.W., Washingt 20005 (Certified Mail)

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FEB 20 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 85-199-M
	:	A. C. No. 15-00037-05501
v.	:	
	:	Docket No. KENT 85-200-M
NALLY & HAYDON, INC., Respondent	:	A. C. No. 15-00037-05502
	:	Hurricane Gap Quarry Mine
	:	
	:	Docket No. KENT 85-201-M
	:	A. C. No. 15-00071-05504
	:	
	:	Harlan Mine
	:	

DECISION APPROVING SETTLEMENT

Before: Judge Kennedy

This matter is before me on the parties' amended motion to approve settlement by increasing the amount of the settlement proposed from $1,377 to $7,305.

Based on an independent evaluation and res nova review of the circumstances, I find the settlement, as now proposed, is in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that the operator pay the amount of the settlement agreed upon, $7,305, on or before Friday, March 21, 1986, and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

Department of Labor, 280 U. S. Courthouse, 801 Broadway,
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Albert Haydon, President, Nally & Haydon, Inc., P. O. Bo
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FEB 20

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 84-43 A.O. No. 44-03868-03520-A
v.	:	CC&P Coal Co. No. 1 Mine
RUFUS BALDWIN, Respondent	:	

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner.

Before: Judge Maurer

STATEMENT OF THE CASE

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to Section 110(c) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 820(c), seeking a civil penalty assessment of $500. More particularly, it is alleged that on October 20, 1982, the respondent, acting as an agent of the corporate mine operator, CC and P Coal Company, within the meaning and scope of Sections 3(e) and 110(c) of the Act, knowingly authorized, ordered or carried out the corporate mine operator's violation of 30 C.F.R. § 75.511, as stated in Section 104(d)(1) Citation No. 2071403. Said Citation, as modified, states as follows:

> Electric work was performed on the 220 volt control circuit on the Lee Norse 245 continuous mining machine without opening and locking out the disconnecting device. A fatal machinery accident occurred.

On October 27, 1983, the CC and P Coal Company paid a civil penalty assessment of $2,000 for the foregoing violation (Petitioner's Exhibit No. 9).

on December 10, 1985, and while the petitioner appeared, the respondent did not. In spite of the respondent's failure to appear, the hearing on the merits proceeded without him. For reasons discussed later in this decision, respondent is held to be in default, and is deemed to have waived his opportunity to be further heard in this matter.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95164, 30 U.S.C. § 801 et seq.

2. Commission Rules of Procedure, 29 C.F.R. § 2700.1 et seq.

ISSUES

The issues presented in this case are whether the petitioner has established a violation of Section 30 C.F.R. § 75.511 and that this respondent as an agent of CC and P Coal Company, knowingly authorized, ordered or carried out that violation; and if so, the appropriate civil penalty that should be assessed.

PETITIONER'S CASE

Petitioner introduced the following exhibits that were received in evidence in this proceeding:

1. A copy of Control Order No. 2003745 dated October 20, 1982.

2. A copy of the Legal Identity Report for No. 1 Mine, CC and P Coal Company, dated June 2, 1982.

3. A copy of a letter dated November 5, 1982, from CC and P to MSHA establishing interstate commerce.

4. A copy of the Section 104(a) Citation No. 2071403, issued on October 21, 1982.

5. A copy of the modification of Citation No. 2071403 to a 104(d)(1) citation, dated October 27, 1982.

7. A copy of a Memorandum of Record to the District Manager from Roy D. Davidson concerning the fatal accident of October 20, 1982.

8. A copy of the Report of Investigation concerning the fatal accident of October 20, 1982, co-authored by Dorsey C. Owens and Roy D. Davidson.

9. A copy of the Decision Approving Settlement in the case styled Secretary of Labor, Mine Safety and Health Administration (MSHA) v. CC and P Coal Company, 5 FMSHRC 1938 (1983).

10. A computer printout certified by the Office of Assessments of the Mine Safety and Health Administration, showing that the civil penalties, assessed by the ALJ in Exhibit No. 9, supra, were paid by the corporate operator, CC and P Coal Co.

Mr. Roy D. Davidson appeared and testified on behalf of the petitioner. He is an electrical engineer employed by MSHA in Northern Virginia and as such has been involved in coal mine accident investigations for some ten (10) years. He investigated the fatal accident which is the subject of this case and co-authored the final version of the Report of Investigation (Petitioner's Exhibit No. 8).

The substance of his testimony was that Mr. Baldwin, respondent herein, was performing some electrical work on the start-stop switches that control the ripper heads, conveyor chain and pump motor of the continuous miner at the time the fatal accident occurred. This was a low-voltage circuit and Baldwin was performing this work without opening and locking-out the disconnecting device. In Mr. Davidson's opinion it was Baldwin's responsibility to see to it that the disconnecting device was open and locked out per 30 C.F.R. § 75.511. He also believes that this is common knowledge in the mining industry and therefore that Baldwin knew it was required and also knew there was power on the machine just prior to the accident.

At the time of the accident, Baldwin was employed at CC and P Coal Company as a section foreman and also a certified electrician and the electrician of the section. The accident victim, Orville Terry Cooper, worked for Baldwin on his crew.

the power has been removed from the continuous mining machine.

Mr. Davidson reconstructed the accident on the record as follows: On the morning of October 20, 1982, at approximately 8:00 A.M., the section crew with Mr. Baldwin as the section foreman entered the mine. They arrived on the section at approximately 8:30 A.M. This particular Lee Norse continuous mining machine had had electrical problems for several months with the ripper heads, conveyor belt and pump motor coming on inadvertently. It also had had intermittent problems with stopping the ripper heads. Baldwin knew of this and was directly involved with these problems. On the day of the accident, the previous shift had already worked on the continuous miner all night, and the ripper heads had been raised into an upper position and were supported by wooden blocks. The morning of the accident, Baldwin removed a control panel on the mining machine to work on the methane monitor and he assigned Tim Elswick, the scoop operator, to go to the power center and "kill the main power supply." After correcting the problem with the methane monitor, Baldwin put the control panel back and replaced the cover on the main control panel in the operator's deck. After work on the methane monitor system was completed, electric power was restored at the power center. Immediately prior to the accident, Baldwin was preparing to install some insulating paper behind the start-stop switches to prevent the switches from contacting the inside of the switch control panel and becoming shorted across. Terry Rose, working with and for Baldwin, raised the ripper heads to remove the wooden blocks and then let the ripper heads come down to the floor. This fact in and of itself would indicate to all, including Baldwin, that there was power on the machine. It had been turned back on. Prior to commencing work on the switches, Baldwin had assigned three (3) of his men, including the victim, Cooper, to tighten the ripper chain while he and Rose worked on the start-stop switches. They were so engaged when at approximately 9:30 A.M. as Baldwin was removing the switch from its mounting location, the rippers suddenly started, catching Cooper, who was bending over the rippers assisting in tightening the ripper chain adjustment bolt, and fatally injuring him.

FINDINGS AND CONCLUSIONS

RESPONDENT'S FAILURE TO APPEAR AT THE HEARING

The record in this case reflects numerous attempts to establish contact by mail or telephone with Mr. Baldwin on

issues in this case. The only communication from him in this record is an undated "Answer" that states that he does not disagree with the violation, only with the gravity of the violation and recites that he cannot afford to pay $500.

On the morning of the hearing (December 10, 1985), which was "noticed" on October 17, 1985, Mrs. Baldwin called Mr. Smith to explain that her husband would not be at the hearing that morning because his car was broken down in Alabama, where he now works. She was unable to provide a telephone number to call Mr. Baldwin, either at home or at work.

Under the circumstances in this record, which include at least three attempts (all unsuccessful) to communicate with Mr. Baldwin subsequent to his belatedly filing an "Answer," I conclude and find that he has waived his right to be heard further in this matter and that he is in default.

Although Commission Rule 29 C.F.R. § 2700.63 calls for the issuance of a Show Cause Order before a party is defaulted, given the facts of this case where the respondent has repeatedly failed to respond or otherwise communicate with me or counsel for petitioner, I conclude that the issuance of such an order would be a futile gesture.

FACT OF VIOLATION

I conclude and find that the petitioner has established a violation of 30 C.F.R. § 75.511 by a preponderance of the evidence. Respondent himself, by his "Answer" does not "disagree" with the facts of the violation. In any event, the evidence is undisputed that electrical work was being performed by Baldwin on a low voltage circuit without opening and locking out the disconnecting device.

Negligence

Mr. Davidson testified that it is common knowledge in the coal mining industry that when you perform electrical work on a piece of machinery, you must open and lock out the disconnecting device. It was Mr. Baldwin's responsibility to do this. He knew there was power on the machine. He knew the machine had a history of electrical difficulties. Yet he assigned three of the men on his crew to work on the ripper chain, which required them to place themselves in close proximity to the rippers while he performed electrical work on the start-stop switches for the rippers. I conclude and find that this constitutes an extremely high degree of negligence.

Gravity

I find that this violation was extremely serious. It was the direct cause of a fatality.

History of Prior Violations

Counsel for petitioner has stated and I find that Mr. Baldwin, personally, has no history of prior violations.

Section 110(c) Criteria

The undisputed evidence in this case establishes without any question that Mr. Baldwin, the individual respondent herein, was the agent of CC and P Coal Company and as such did personally and knowingly authorize, order and carry out the violation of § 75.511 cited in this instance.

Civil Penalty Assessment

The violation in this case was assessed by MSHA at $500. This was amended at the hearing to $1,000 by counsel for petitioner. I fully concur that $1,000 would be a reasonable penalty for the egregious violation in this case. However, because of the default nature of the proceeding and because it is reasonable to assume that Mr. Baldwin reasonably expected his penalty would be limited to the maximum of which he had notice, and taking into account the requirements of Section 110(i) of the Act, I conclude that a civil penalty assessment of $500 will adequately serve the public interest.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $500 for the violation in question, and payment is to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment by the petitioner, this case is dismissed.

Roy J. Maurer
Administrative Law Judge

Distribution:

J. Philip Smith, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Mr. Rufus Baldwin, Post Office Box 146, Peterson, AL 35478

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FEB 24 1986

ECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 86-25-M
	:	A.C. No. 23-00494-05512
v.	:	Viburnum No. 28 Mine
P. JOE MINERALS CORP., Respondent	:	

ORDER APPROVING SETTLEMENT

efore: Judge Broderick

On February 13, 1986, Petitioner and Respondent filed joint motion to approve a settlement agreement originally ssessed at $7000 propose to settle for $5000.

The violation charged was failure to take down loose labs of pillar which resulted in a fatal accident. The otion states that Respondent's negligence originally judged s moderate was in fact low, because the evidence shows that espondent repeatedly advised employees to avoid the area of he mine where the accident occurred. The violation was ery serious. I accept the representation in the motion and onclude that the settlement should be approved.

Accordingly, the settlement is APPROVED and Respondent s ORDERED TO PAY the sum of $5000 within 30 days of the date f this order.

James A. Broderick
James A. Broderick
Administrative Law Judge

istribution:

obias B. Fritz, Esq., U.S. Department of Labor, Office of the olicitor, 911 Walnut St., Kansas City, MO 64106 (Certified Mail)

ichard J. Ashby, Esq., P.O. Box 500, Viburnum, MO 65566 Certified Mail)

February 26, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDI
	:	Docket No. CENT 85-19-I
	:	A. C. No. 29-00159-055
v.	:	
	:	Docket No. CENT 85-37-I
PHELPS DODGE CORPORATION/ TYRONE BRANCH, Respondent	:	A. C. No. 29-00159-005
	:	
	:	Tyrone Mine & Mill

DECISION

Appearances: Eve Cnesbro, Esq., Office of the Solicit
U. S. Department of Labor, Dallas, Texas
Petitioner;
Stephen W. Pogson, Esq., Evans, Kitchel
Jenckes, P. C., Phoenix, Arizona for Res

Before: Judge Merlin

These cases are petitions for the assessment of civi penalties filed under section 110(a) of the Federal Mine and Health Act ("the Act") by the Secretary of Labor agai Phelps Dodge Corporation/Tyrone Branch, for alleged viola the mandatory safety standards.

Stipulation

At the hearing, the parties agreed to the consolidat hearing and decision of the two docket numbers (Tr. 3).

They also agreed to the following stipulations (Tr.

(1) Phelps Dodge, Tyrone Mine and Mill, are subject Act and that MSHA has safety and health jurisdiction over

(2) the citations were duly issued and served by MS

(3) there were 57,120,000 tons of ore and waste fro mine at the Tyrone Mine during the calendar year 1984;

(4) the Tyrone Mine and Mill is a large open pit op

Based upon the print-out submitted (MSHA Exhibit P-3) I find e operator's prior history of violations is good.

Cent 85-19-M

ation No. 2092265

The subject citation dated October 10, 1984, describes e allegedly violative condition or practice as follows:

> The company posted a list "miner representative" dated 10/4/84 on top of the miner representative list received by MSHA dated 10/1/84. The company list has two additional names dated April 7, 1980 and the other 12/26/83. A copy of the most current status list presented to the company and MSHA is only posted at the safety office bulletan [sic] board where not all employees can observe the list of the miners representing them. Tony Trujillo said he made up this list.

30 C.F.R. § 40.3 provides as follows:

> (a) The following information shall be filed by a representative of miners with the appropriate District Manager, with copies to the operators of the affected mines. This information shall be kept current.
>
> (1) The name, address and telephone number of the representative of miners. If the representative is an organization, the name, address and telephone number of the organization and the title of the official or position who is to serve as the representative and his or her telephone number.

Section 40.4 provides that:

> Posting at Mine
>
> A copy of the information provided the operator pursuant to § 40.3 of this part shall be posted upon receipt by the operator on the mine bulletin board and maintained in a current status.

This list has three miner representatives and sixteen alterna
Directly underneath this list on the board was another list d
October 1, 1984 which was the same as the one on the top exce
that it had only one of the three miner representatives and i
had a certification by the one named miner representative tha
the list had been submitted to MSHA (MSHA Exhibit P-6; Operat
Exhibit R-17). It is agreed that the two additional miner re
sentatives on the top list were proper miner representatives
had submitted the appropriate designation forms to MSHA (MSHA
Exhibits P-8 and P-9). The top list was therefore, a composi
put together by the operator from the separate forms it had
received from its miners which they had sent to MSHA.

The regulation does not specifically address the situati
where multiple forms are separately submitted to MSHA and ind
ually given to the operator. I conclude that the list compil
by the operator and placed on the top on the safety office bu
tin board, was a sensible, fair and permissible way of handli
such a situation. The MSHA inspector admitted he had no quar
with the accuracy of the top list (Tr. 12). And the company
played no part in selecting the representatives. It merely c
piled on one piece of paper the separate pieces of paper each
which had been sent to MSHA individually. Its actions were
purely ministerial and added nothing of substance. The only
ternative would have been for the operator to post separate
pieces of paper side by side all over the bulletin board. Th
would not have aided the process of miner representation. On
contrary, it would have been complicated and confusing. The
operator used good judgment and good sense. If MSHA wants th
matter handled differently, it can amend the regulation to sp
fy what it wants done. But as matters now stand, the operato
must be held to have acted reasonably and efficaciously.
Accordingly, I hold the composite list posted on the top in t
safety office bulletin board was acceptable.

The next issue is the required posting location for the
propriate list. The regulation requires that the list which
be maintained in a current status be posted on the mine bulle
board. In this case there were three bulletin boards. One,
already discussed was inside the safety office ("A" on MSHA
Exhibit P-14). The second board was glassed in and secured o
the outside wall of the building which housed the mine office
changing room (Tr. 20-22; 57-59; "B" on MSHA Exhibit P-14).
the door of this building was a sign "Mine Office" and on the
of the board itself was a sign "The Mine Bulletin Board" (Tr.
On this bulletin board was posted a list of miner representat
dated September 15, 1980 with some updating notations (Tr. 17
22, 70, MSHA Exhibit P-7). A comparison with the 1984 list po

. 58, "C" on MSHA Exhibit P-14). The same 1980 list was on s board as on the board on the mine office building (Tr. 23).

I conclude the 1980 list was not current and therefore, not ceptable under the regulations. The question then becomes: the posting in the safety office sufficient? I conclude it not. The regulation requires posting on the "mine bulletin ard". There was just such a place in this case. The second ard ("B") was entitled "Mine Bulletin Board" and was mounted t to a door marked "Mine Office" (Tr. 57). Admittedly, mill loyees regularly do not pass by the mine bulletin board but e employees do so regularly on their way to the changing room ch is in the same building (Tr. 58). There is no requirement t every employee pass by the designated location nor is there equirement for multiple postings. The safety office is where loyees would only go for training or if they have dealings h the safety department (Tr. 50). Posting the current list on safety office bulletin board did not meet the requirements of regulations. Accordingly, I find the operator violated this ject of the mandatory standard.

The violation was nonserious. Negligence is low. As eady set forth, I find the operator's prior history is good I accept the stipulations regarding the other criteria.

A penalty of $20 is Assessed.

Cent 85-37-M

tation No. 2092266

The subject citation dated October 10, 1984, describes the legedly violative condition or practice as follows:

> "The lime slaker area at this time was not kept clean of slick spilled wet lime. An injury was reported on 9/[illegible] with the injured employee still [illegible] lost time because of a slip and fall which resulted with a back injury.
>
> An employee, Gilbert A. Romero "helper", stated that this area is cleaned each shift and that at this time when the inspection party arrived, duty called and he was not cleaning at this time.

30 C.F.R. § 55.20-3 provides as follows:

> 55.20-3 Mandatory. At all mining operations: (a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly. (b) The floor of every workplace shall be maintained in a clean and, so far as possible, a dry condition. Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats, or other dry standing places shall be provided where practicable. (c) Every floor, working place, and passageway shall be kept free from protruding nails, splinters, holes, or loose boards, as practicable.

There is no dispute that when the inspector arrived, the oor of the lime slaker area was covered with waste material om the slaker and that the drains were clogged (Tr. 107). The idence further indicates that in accordance with established ocedures the lime slaker helper had intentionally emptied the ntents of the slaker chamber onto the floor because the chamber d become plugged (Tr. 151). The helper was supposed to clean the floor immediately but he had to leave to go to the bath- om (Tr. 110). At this time the inspector arrived and issued e subject citation. MSHA's witness and the operator's witness reed that the condition which the inspector found could have curred during the brief interval the helper was gone (Tr. 5, 154). In the absence of evidence on the point, I cannot cept the unsupported suggestion that the helper could have gone the bathroom before he emptied the slaker chamber (Tr. 147). appreciate the inspector's concern over the condition he saw. wever, a little common sense would not be amiss in a case such this. Under the circumstances presented I cannot find the erator failed to comply with the mandatory standard.

Citation No. 2092266 is Vacated.

ORDER

In light of the foregoing, the operator is ORDERED TO PAY within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

abor, 555 Griffin Square Building, Suite 501, Dallas, TX 75202
Certified Mail)

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FMC WYOMING CORPORATION, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEST 85-4-RM Citation No. 2084591; 9/17
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 85-41-M A.C. No. 48-00152-05525
v.	:	FMC Trona Mine
FMC WYOMING CORPORATION, Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., and Margaret Miller, Es
Office of the Solicitor, U.S. Department of Lab
Denver, Colorado,
for Respondent/Petitioner;
John A. Snow, Esq., VanCott, Bagley, Cornwall &
McCarthy, Salt Lake City, Utah,
for Contestant/Respondent.

Before: Judge Lasher

This matter is comprised of a contest proceeding filed b
FMC Corporation (herein FMC) on October 9, 1984, pursuant to
Section 105(d) of the Federal Mine Safety and Health Act of
30 U.S.C. Section 801 et seq., (herein the Act), and a civil
penalty proceeding initiated by the Secretary of Labor on
February 25, 1985, by the filing of a Proposal for Penalty
pursuant to Section 110 of the Act.

A hearing on the record was held in Salt Lake City, Utah
March 6 and 7, 1985, at which both parties were represented b
counsel. The two dockets comprising this proceeding were co
solidated for hearing on March 6, 1985 (Tr. 2) since the sub
of both is Citation No. 2084591 issued by MSHA Inspector Ron
L. Beason on September 17, 1984, at FMC's trona mine located
Green River, Wyoming. This Citation was issued under Sectio
104(d)(1) of the Act, and alleges that the violation of the

y and health standard cited, 30 C.F.R. § 57.20-11 [1]/ was
d by the "unwarrantable failure" of FMC to comply with such
ard.

The violative condition (or practice) was described in the
ion as follows, to wit:

"The old MCC Motor Control room (Baby Sesqui) was insulated with a material which contained chrysotile asbestos. The insulation had deteriorated and had fallen from the roof and portions of the wall. The material was 2-1/2 inches thick and had fallen from the south wall. The lower measures 4 feet x 2-1/2 feet. The upper section which had fallen measured 2 feet x 3 feet. The motor control room measured 9 feet x 12 feet and the insulation had fell from the roof. Loose insulation hanging on railings and electrical conduit measured approximately 2-1/2 inches thick by 2 feet wide by 3 feet long. Another section was approximately 10 x 10 inches. Apparently the roof section and wall sections of insulation had fallen to the floor and had been sweeped up. Fresh signs of cleaning were apparent. Recently employees had disconnected the electrical switchgear in the room, except three panels for lighting & heating etc.

Asbestos has been determined to be a health hazard and is associated with asbestosis, lung cancer and cancer of the gastrointestinal tract. When suspended fibrous dust particles do not readily settle, but remain suspended for long periods of time, therefore they continue to present an hazard to the employees which worked inside the control room.

On 3-20-1981 the operators records indicated that a sample of the insulation had been taken and found to contain asbestos. The operator failed to barricade the area or post warning signs which displayed the nature of the hazard and the respiratory protection required. Due to the association of asbestos to lung disorders, the obvious work completed in an enclosed room, the unknown contamination, this is an unwarrantable failure of the

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his regulation provides:
'Areas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, display the nature of the hazard, and any protective action required."

operator to take the appropriate safety measu
sure that the employees were adequately prote
working in this area."

The Secretary initially proposed a penalty of $4
the alleged violation but at the hearing and in his p
brief urged the maximum penalty authorized in the Act

The Secretary contends that the presence of a po
carcinogen, asbestos, in a working environment in and
is a hazard which requires the mine operator to compl
subject regulation by either barricading or posting w
signs.

FMC contends that the Secretary (MSHA) has deter
officially advised the mining industry what is a safe
level of asbestos by the promulgation of 30 C.F.R. 57
provides:

> § 57.5 Air quality, ventilation, radiation, a
> physical agents.
>
> Air Quality
> General-Surface and Underground
>
> 57.5-1 Mandatory. Except as permitted by § 57.5
> cept as provided in paragraph (b), the exposure
> contaminants shall not excee, on the basis of a
> ed average, the threshold limit values adopted
> American Conference of Governmental Industrial I
> as set forth and explained in the 1973 edition o
> ference's publication, entitled "TLV's Threshold
> Values for Chemical Substances in Workroom Air A
> ACGIH for 1973," pages 1 through 54, which are h
> corporated by reference and made a part hereof.
> cation may be obtained from the American Confere
> Governmental Industrial Hygienists by writing to
> tary-Treasurer, P.O. Box 1937, Cincinnati, Ohio
> may be examined in any Metal and Nonmetal Mine S
> Health District or Subdistrict Office of the Min
> Health Administration. Excursions above the lis
> thresholds shall not be of a greater magnitude t
> characterized as permissible by the Conference.
> (b) The 8-hour time-weighted average airborne co
> of asbestos dust to which employees are exposed
> exceed 2 fibers per milliliter greater than 5 mi
> length, as determined by the membrane filter met
> 400-450 magnification (4 millimeter objective) j

or 10 fibers longer than 5 micrometers, per milliliter of air, as determined by the membrane filter method over a minimum sampling time of 15 minutes. "Asbestos" is a generic term for a number of hydrated silicates that, when crushed or processed, separate into flexible fibers made up of fibrils. Although there are many asbestos minerals, the term "asbestos" as used herein is limited to the following minerals: chrysotile, amosite, crocidolite, anthophylite asbestos, tremolite asbestos, and actinolite asbestos.

The subject Citation was issued on September 17, 1984, ng an ongoing regular inspection which was nearing completion. alleged violation occurred in an 11' by 12' room called the Motor Control Center" located in the so-called "Baby Sesqui" lex at the mine. This room is located on the ground floor of complex which is approximately five or six floors high (Tr. and at the times material herein it housed the electrical rols for the complex (Tr. 107). The Baby Sesqui complex ains part of FMC's milling process (Tr. 99). The room itself lso known as the "Baby Sesqui control room," "The old MC" and "MCC" (Tr. 30). It will be referred to herein as the MCC.

The MCC, as previously noted, is approximately 11 feet by 12 and has but one door and no windows (Tr. 30, 116, 171). e is no ventilation system for the room (Tr. 70). The door s from the outside and there is no entry into the Baby Sesqui the MCC (Tr. 121, 142). The Baby Sesqui, even though part he milling area, is essentially dust free because the ict-trona-is brought in in a liquid state (Tr. 142, 183,

The insulation in the MCC, which was 2-1/2 inches thick (Tr. 57, 58) contained 20% asbestos (Exs. S-12 and S-13; Tr. 25, 48, 61, 66, 240, 265). FMC concedes it was aware of the stos content of the insulation (Tr. 59-62, 63) and that ng a time certain work was performed in 1983/1984 airborne stos fibers would have been present in the MCC (Tr. 345).

Inspector Beason credibly described the pertinent part of inspection as follows:

Q. Okay. When you entered the motor control center, what did you observe?
A. Well, I observed this insulation that was on the walls. It was deteriorated, fallen down. It was on top of the control boxes, electrical switches. I went over and looked at the electrical switches. It was on top of them. There was a piece off on the right - the south wall - that I took a piece off and got to fooling with it and talking about it.

Q. What was the texture of this?
A. It was brittle. There was shiny parts in it got it in here; and with my glasses - I've got t glasses - I got up and looked at it. And it loo brittle.

Q. Did you know what that material was at that
A. No, ma'am. I asked Mr. Hatt [2]/ what it was time.

Q. And what did Mr. Hatt tell you?
A. He refused to answer me.

Q. How did you find out what that material was?
A. Well, I went to him several times. I had it to him several times and asked him what it was. fused to answer. I asked him if I could get a s material. He said that I could. And I went nex another place there and asked him if I could tak And he said yes.
And I put it in. And I asked him was that asbes time I asked him. And he said he wouldn't tell to talk to the environmentalist.

Q. Who is the environmentalist?
A. I've got his -

Q. Could that be Mr. Watson?

THE WITNESS: Carl Watson [3]/
(Tr. 31-33)

XXXX XXXX XXXX XXXX

"Q. Did you ever see the results of the materia which you put in the bottle and turned in?
A. Yes, sir.

Q. Is that this Exhibit 12?
A. Yes, sir.

Q. And does it indicate on there what the mater
A. Yes, sir.

2/ Bud Hatt, FMC safety supervisor.
3/ Carl L. Watson, Environmental/Safety Engineer (Tr

(Tr. 40).

The sample of insulation material taken was representative
e insulation found around the MCC (Tr. 31, 41-43), which had
n from the walls and roof of the room (Tr. 44, 56) and was
ved (1) on top of a conduit, control boxes, electrical
hes, (2) hanging from the rafters (Tr. 31, 43-45), (3) on
andles of a control panel (Tr. 45),(4) inside the control
(Tr. 48), and (5) on the floor mats and other areas (Tr.
This insulation material was deteriorating and falling down
the walls and roof (Tr. 31, 58, 44).

The record in this case provides adequate information as to
eneral characteristics and hazardous nature of asbestos.
tos is the generic name for a number of hydrated silicates
244). Chrysotile is one such silicate (Tr. 244, 30 C.F.R.
5). Asbestos is composed of fibers which are bundled
her to form larger fibers which in turn are bundled together
rm still larger fibers (Tr. 245). The result is that as
tos is broken down it does not break down into pieces but
r as each fiber is broken down it releases many more fibers
in turn, if broken down, release still more fibers (Tr.
Asbestos fibers 5 microns or larger in size are clearly
dous (Tr. 247, 30 C.F.R. § 57.5-1). Five microns is
ximately one-tenth the size of a particle visible to the
ed eye (Tr. 247). A visible cloud of airborne asbestos
ins harmful fibers that are invisible (Tr. 246-249) and will
approximately 30 minutes to fall one-foot in perfectly still
nd longer if there is any air current present. Such a fiber
ecome airborne simply by the air currents created by a
n walking (Tr. 247-248). Asbestos can be liberated and
nded in the air easily and by slight movement, such as a
n walking by it (Tr. 67).

Richard L. Durand, an MSHA District Industrial Hygienist,
fied concerning the invisible (non-obvious) nature of
tos:

"Q. If you can see a cloud of dust of asbestos, is it
ble to have more asbestos that you can't see that is
nded in the air?
A. Definitely. You'll have a range of dust particles
that you can't see on up to very large particles. You have
le gamut of sizes.

Q. And would those particles that you can't see present
lth hazard?
A. Yes, even above five microns, what the standard is
on. So from five to fifty are particles that you can't see.
hey will definitely pose a health hazard." (Tr. 249).

period of time. It results when fibers are inhaled directly into the lungs. As the fibers are retained by the lungs they are coated with cells rich in iron called "asbestos bodies" discernible by x-ray. The symptoms therefrom may appear from 4 to 15 years after exposure. Such symptoms are shortness of breath, coughing, tightening of the chest, difficulty in breathing and a hampering of the lungs to exchange oxygen. Death can occur 10 to 15 years after the onset of symptoms (Tr. 250, 251).

A second disease resulting from asbestos inhalation is bronchi carcinoma or bronchial cancer. Asbestos, when inhaled into the bronchial area, can lead to the development of cancer.

Mesothelioma is a cancer of the lining of the lung. It is a non-treatable, non-operable and always fatal disease. Death generally results in less than one year after the onset of symptoms (Tr. 253). This disease can result from the inhalation of a single fiber. As little as one occupational exposure to asbestos can cause this cancer (Tr. 254). It is estimated that 7% to 10% of those who work with asbestos develop this disease (Tr. 254).

Cancer of the esophagus, stomach and colon can also be caused by asbestos. These cancers are generally brought about by coughing up sputum containing asbestos which is swallowed, thereby transmitting the asbestos fibers to the esophagus, stomach and colon (Tr. 254).

FMC's Environmental Safety Engineer, Watson, unequivocally admitted on the record that asbestos is a "hazardous material" having the potential to cause death (Tr. 309, 311, 312), that it is a known health hazard (Tr. 312) and that FMC did not either barricade the MCC or post warning signs as required by § 57.20-1 (Tr. 114, 237, 296, 313).

Substantial evidence in the record establishes that FMC became aware that the insulation in the MCC contained asbestos in March, 1983, when Mr. Watson removed a piece of the material and forwarded it to FMC's laboratory in Princeton, New Jersey for analysis with the notation to "Please Rush" on the forwarding form. Watson said that he sent the sample to the laboratory at the request of an unidentified employee and that he did not know who made the "Please Rush" notation on the form. Watson also denied writing on the form the statement "Suspected asbestos insulation." (Ex. S-13; Tr. 229-232).

FMC's analysis of the insulation material from the MCC (dated 3/27/81) indicates that the material "contains chrysotile an asbestos mineral and calcium carbonate, probably a binder.

(Ex. S-13, Tr. 237). 4/ FMC failed thereafter to definitely determine if the calcium carbonate was a binder (Tr. 317).

The Secretary established that a significant number of FMC miners without prior notice or warning were exposed to the hazardous conditions prevalent in the MCC. Thus, for periods ranging from two to three weeks to four months in the latter part of 1983 and early 1984, at least [illegible] engaged in the performance of various [illegible] and functions, worked in the MCC where they were engaged in the removal of the control center located there to another location (Tr. 107, 108, 150-157, 170-193, 199-219). The actions of those employees, particularly in taking down the insulation material from the walls and ceiling, created airborne dust composed of particles of the insulation taken down (Tr. 115-119, 153-158, 166, 206, 208). The record does not indicate that FMC ever sampled the composition of the air during this period. Since the material itself was composed of 20% asbestos I find therefrom--and from expert opinion of record - that at least a proportionate part of the airborne dust was composed of asbestos particles in sufficient quantity to (1) be subject to inhalation and (2) be hazardous. (Tr. 111, 193, 249, 255-259, 260, 266, 277-282, 290, 345).

It is also found that the "dust" described by the workmen was not attributable to the welding or use of a cutting board (Tr. 285). Thus, the four workmen in question testified that in the process of their work they "tore" insulation from the walls, pulled it from the ceiling, threw the insulation to the floor, swept it up, emptied it, and traumatized it in various ways which resulted in dust so heavy their visibility was impaired at times beyond 4 or 5 feet (Tr. 111-119, 153-157, 166, 173-177, 199-208).

While there was evidence that the dust got into their mouths, eyes and noses, there was no probative or reliable evidence that the coughing and other symptoms described by them was attributable to inhalation or other ingestion of asbestos fibers (Tr. 282, 349). Such evidence might have been obtainable through sputum analysis or other forms of testing at the time. Even though it is a fair inference that such evidence was not

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4/ In addition to analyses of the "bulk" samples taken by Inspector Beason and Mr. Watson referred to above, a third set of laboratory analyses of samples taken from the MCC was made part of the evidence in this matter. Thus, in September 1984, FMC took samples of the air (Exs. R-3, 4, 5 and 6; Tr. 267, 268, 300) I find that these analyses have little probative value since no one was working in the area at the time the samples were gathered (Tr. 267, 268, 321, 322). Even so, these samples did show there was some airborne asbestos present in the MCC (Tr. 268).

secured because of the failure of FMC to notify those i
of the conditions prevalent in the MCC, no adverse infe
taken in the absence of more specific evidence. That i
not inferred that the physical symptoms expressed were
whole or in part by the presence of airborne asbestos i
atmosphere.

In addition to the employees engaged in the specia
of removing the controls from the MCC in 1983-1984, the
also showed that various other employees, such as maint
and electricians, routinely went in and out of the MCC
there without benefit of respirators or warning (Tr. 99
333-335).

As previously noted, FMC contends that no violatio
established absent a showing of the presence of exposur
borne contaminants at the levels provided in 30 C.F.R.
From the standpoint of the obligations imposed on the m
operator by the two regulations respectively relied on
parties, it is first noted that testing the MCC in a pa
state for its airborne asbestos level might not have re
level in violation of § 57.5-1. A violative level of a
asbestos might not have manifested itself until miners
worked in the area. The record in this case well docum
different types of work activities which did result in
dust from asbestos-constituted insulation into the air.

Section 57.5-1 is specific. It relates to exposur
borne contaminants, in this case, asbestos. It presume
which FMC in any event apparently did not perform - for
tracted period and with some regularity: "The 8-hours t
weighted average airborne concentration of asbestos dus
employees are exposed shall not exceed 2 fibers per mil
greater than 5 microns in length, etc." MSHA did not e
nor did it seek to, the presence of airborne concentrat
asbestos dust in the quantity, fiber lengths, and sampl
durations required to establish a violation of 30 C.F.R
(Tr. 19-26, 71-77, 78, 79; Exs. S-12 and S-13). See Se
Tammsco, Inc., & Harold Schmarje, 7 FMSHRC 2006, 2009 (

On the other hand, the regulation the Secretary ch
infracted, § 57.20-11, is less specific in delineating
factors or environment which must be present to trigger
standard's coverage. It requires simply that (1) a "he
safety hazard" must exist which (2) is not "immediately
From the mine operator's standpoint, § 57.20-11 require
barricades or posting of warning signs telling of the n
the hazard and protective action required. Section 57.
it a violation to permit miner exposure to a specified
asbestos and it mandates testing to ascertain if this l
been achieved. Can a mine operator by not testing when

and most emphatically where an operator directs them to work an area it knows contains asbestos but does no testing while are there. Hence, FMC's miners, were not aware of the presen of asbestos in the insulation material, and thus had no oppor tunity to take precautions to alleviate the threat posed to t such as (1) by limiting their movement and activities, (2) by handling the material more cautiously and gently, (3) by re- fusing to perform certain work unless ongoing testing is cond ed, (4) by altering their techniques and methods, (5) by wear suitable, effective respirators, or (6) by reporting the situation to interested authority such as MSHA, their union, and/or the mine operator's safety personnel.

Analysis of the record and happenings in this matter rea demonstrates the differences in the purposes of and protectio provided by the two regulations and the reasons for not graft one on the other. There is no indication in the Act or the r lations themselves that the two regulations should be read together as FMC urges. Section 57.20-11 does not cross-refer § 57.5-1. It provides a different, separate, and independent measure of protection for miners. It is not dependent on the mine operator's diligent, good faith sampling of the air in t working environment. The position advanced by FMC is found t lack merit.

Based on the preponderant evidence, and admissions of record, it is concluded that a hazardous condition prevailed the MCC during the period in question, that such health hazar was not immediately obvious to numerous employees who worked there, and that neither barricades or appropriate warning sig were posted at any time by FMC at any approach to the MCC. A violation of 30 C.F.R. § 57.20-11 is thus found to have occur

FMC also challenges the special findings required under Section 104(d), that is the so-called "unwarrantable failure" "significant and substantial" findings. It is first noted th insidious potential of asbestos to cause some of mankind's mo fearsome diseases is well-documented in this record. 5/ It i

5/ See also Disability Compensation for Asbestos-Associated Disease in the United States, Irving J. Selikoff, M.D., (Environmental Sciences Laboratory, Mount Sinai School of Medicine, undated), a collection of leading studies on the subject published in approximately 1981.

equally clear, and I have hereinabove found, that the m
operator's Environmental Safety Engineer, Carl L. Watso
other high level management personnel were aware that t
wall and ceiling insulation contained asbestos as early
1981, when a bulk sample was sent for laboratory analys
conclude from the urgency surrounding the taking of thi
the prompt notification to higher management of the res
the laboratory analysis and the testimony of Mr. Watson
high potential for serious disease that asbestos exposu
carries, that FMC was acutely aware of the hazard posed
compliance with 30 C.F.R. § 57.20-11. Indeed, the circ
and hazard addressed by § 57.20-11 actually came to fru
the 1983-1984 period when several employees were engage
removal of the control center inside the MCC without be
the various protections previously listed. These evide
considerations coincide with the requirement of section
the Act that the violation must be "caused by the unwar
failure of (the) operator to comply" with the pertinent
safety or health standard. The Commission in numerous
tacitly approved and has not changed the long-standing
of unwarrantable failure found in Zeigler Coal Company,
280 (1977) which was decided under the Federal Coal Min
and Safety Act of 1969:

> "In light of the foregoing, we hold that an ins
> should find that a violation of any mandatory s
> was caused by an unwarrantable failure to compl
> such standard if he determines that the operato
> has failed to abate the conditions or practices
> tuting such violation, conditions or practices
> operator knew or should have known existed or w
> failed to abate because of a lack of due dilige
> because of indifference or lack of reasonable c

The record indicates also that FMC was aware that
employees were working in the area routinely (Tr. 296,
333-335) and that those employees who were working in t
remove the control center were suffering substantial sy
(Tr. 193, 234) even though this record does not permit
determination that such were wholly or partly related t
exposure. Nevertheless, no further testing on the mate
conducted by FMC to determine if the asbestos was adequ
tained in binding material after March 1981, (Ex. S-13;
329), nor does it appear that FMC tested the air during
moval of the control center in 1983/1984.

It is concluded that FMC was grossly negligent in
the MCC to remain unposted, if not barricaded, in the a
circumstances and in view of the latent threat posed by
presence of asbestos in such significant quantity in th
and ceiling of the MCC. Such high degree of negligence

there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act....

) U.S.C. § 814(d)(1) (emphasis added). Section 104(e) of the ct, 30 U.S.C. § 814(e), contains similar "S & S" language.

The Commission first interpreted this statutory language in ement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981), olding:

> ...[A] violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

FMSHRC at 825 (emphasis added). In Mathies Coal Company, 6 MSHRC 1 (January 1984), the Commission reaffirmed the analytical pproach set forth in National Gypsum, and stated:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3)

/ Herein "S & S".

reasonable likelihood that the hazard contributed t
will result in an injury; and (4) a reasonable like
that the injury in question will be of a reasonably
serious nature.

6 FMSHRC at 3-4 (footnote omitted). Accord Consolidation C
Company, 6 FMSHRC 189, 193 (February 1984).

As to the four elements set forth in Mathies, the Commission, in Secretary v. U.S. Steel Mining Corp., 6 FMSH 1834 (1984), noted that the reference to "hazard" in the se element was simply a recognition that the violation must be than a mere technical violation -- i.e., that the violation sent a measure of danger. See National Gypsum, supra, 3 FM at 827. It also noted that the reference to "hazard" in th third element in Mathies contemplates the possibility of a subsequent event. This requires that the Secretary establi reasonable likelihood that the hazard contributed to will r in an event in which there is an injury. The fourth elemen Mathies requires that the potential injury be of a reasonab serious nature. Finally, in U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (1984), (1984), the Commission reemphasiz holding in National Gypsum that the contribution of the vio to the cause and effect of a mine safety hazard is what mus significant and substantial.

The record reveals that from the middle of 1981 at lea through early 1984, FMC employees worked routinely in the M asbestos-laden, unventilated room, and for the latter part this period other employees were required to work there whi removing controls. This latter group, four of whom testifi this proceeding, in ignorance of the risk and the need for removed the asbestos insulation without caution, thus placi their health in considerable jeopardy.

Mr. Watson's own description of the risk posed by asbestos exposure is incisive:

"Q. Do you recognize any danger in exposure to asb
A. Sure.

Q. I mean, do you personally believe that is is a hazardous industrial material?
A. Sure.

Q. Do you believe that it has the potential to cau death?
A. Yeah, I believe that."

(Tr. 308, 309, 312).

afforded by 30 C.F.R. § 57.5-1. Such failure clearly contributed a considerable measure of danger to their safety.

In the absence of any affirmative measures by FMC to prevent its miners' exposure to the asbestos hazard found to have existed in the MCC, their resultant contraction of various asbestos-related diseases remains a reasonable possibility for many years to come.

The factual findings heretofore made concerning the nature of asbestos, the ease with which it becomes airborne, the conditions prevalent in the MCC working environment, the exposure of uninformed miners, the various health problems which can result from such exposure, the percentage of exposed workers who contract such, and the lengthy period they will remain in jeopardy after such exposure, mandate the conclusion that there was -- and is -- a reasonable likelihood that the hazard contributed to by the violation will result in a serious injury in the form of a disease. Lastly, there is little doubt on this record that any disease so resulting would be of a reasonably serious nature in view of FMC's admissions that such could result in death. Accordingly, it is concluded that this was a "significant and substantial" violation.

The prerequisite special findings of the 104(d)(1) Citation herein are found to have substantial support in the record.

A violation having been found in this consolidated contest/-penalty proceeding, assessment of a civil penalty is required. The parties have stipulated that FMC had an "average" history of previous violations, presumably in the customary 2-year period preceding the occurrence of the violation (Tr. 293). The parties also stipulated on the record that FMC is a large mine operator, that it proceeded in good faith to achieve rapid compliance after notification of the violation, and that any penalty amount would not jeopardize FMC's ability to continue in business. Section 110(i) of the Act requires evaluation of two additional, and critical, penalty assessment criteria -- the seriousness of the violation and the negligence of the mine operator in the commission thereof. I have previously determined that FMC was grossly negligent in the commission of this violation and that the same was of a high degree of seriousness in view of the tragic, possibly fatal diseases which can result therefrom. The workmen exposed will live in the shadow of asbestos-related disease for many years to come. In view of these latter two

ORDER

1. Citation No. 2084591 is affirmed in all respects.

2. Respondent FMC shall pay the Secretary of Labor the su of $2,500.00 as and for a civil penalty within 30 days from the date of issuance of this decision.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

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/blc

CYPRUS MINES CORPORATION, Respondent : Cyprus Northumberland Project

DECISION

Appearances: Mary Gray Holt, Esq., Jolles, Sokol & Bernstein, Portland, Oregon, for Complainant; John F. Murtha, Esq., Woodburn, Wedge, Blakey & Jeppson, Reno, Nevada, for Respondent.

Before: Judge Morris

Complainant Harold J. Atkins, (Atkins), brings this action on his own behalf alleging he was discriminated against by his employer, Cyprus Mines Corporation, (Cyprus), in violation of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the Act).

Section 105(c) of the Act, provides in part, as follows:

> No person shall discharge or in any other manner discriminate against ... or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner ... has filed or made a complaint under or relating to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners ... of an alleged danger or safety or health violation ... or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this Act.

After notice to the parties, a hearing on the merits took place in Reno, Nevada on June 19, 1985.

The parties filed post-trial briefs.

by respondent in violation of the Act. If such discrimination occurred, then what damages should be awarded.

Summary of the Evidence
Complainant's Evidence

Harold J. Atkins, 43 years of age and inexperienced in mining, was hired by Cyprus on July 9, 1981. His initial duti included utility work and cleaning the leach pads. His activi ties also involved work in the ADR [1]/ unit where the utility c helped mix cyanide and haul water. The water, dumped into a preholding tank, feeds the boiler (Tr. 34-37, 41).

After three months Atkins transferred to the pit as a gra operator where he remained about 2 1/2 to 3 months (Tr. 37).

About October 1, 1981, because of higher pay, Atkins transferred to the ADR plant as an operator (Tr. 38). He had previous experience and the foreman trained him to run the mil (Tr. 39). The work process in the ADR was described as follow material containing gold and precious metals enters a preg pon from the leach pads. The material then goes into the ADS circ Solution is filtered through and captured in the carbon (Tr. 3

After a time the material is moved into a preheat holding tank and later transferred to a strip tank. The solution is t heated by a boiler and it then goes to electrowind where the g is removed (Tr. 40). The procedures include stripping, reclai ing and preheating. The stripping process was almost continuo (Tr. 40, 42).

After two or three weeks in the ADR plant Atkins experien a "nuisance" from the ammonia released in the stripping proces He had headaches; in addition, his nose was dry and bothering Since he felt the condition was minor he did not see a doctor that time (Tr. 41, 42).

Atkins was elected to the mine safety committee and atten his first meeting in February 1982. The Committee discussed first aid, inadequate ventilation and communications in event emergencies. When Atkins applied for the foreman's position h was told he could not remain as a member of the committee if h received the promotion (Tr. 42-44, 48).

1/ ADR: an acronym for absorption, deabsorption and refining (254).

t. He further recommended that Atkins and anyone else in the R contact a doctor. This was the reason Atkins sought medical tention (Tr. 47).

Sometime in April, about the time of the discussions with gace, Atkins thought he had a physical problem. The buildup of e ammonia was progressing to a point where he knew he should ve his sinuses checked. His nose was dry all of the time and was having breathing problems. Additional symptoms included adaches, dizziness and blurred vision. Neither food nor coffee sted right (Tr. 49-51).

Most of the time during his stay in the ADR, Atkins' main oblem and concern was exposure to ammonia fumes (Tr. 120; Ex. 3, pg. 2). MSHA did not issue any citations for excessive vels of ammonia (Tr. 121).

Atkins visited Dr. Horgan on April 24, 1982. A quantitative st for mercury showed a level of 65. Industrial guidelines dicate an acceptable level is under 150. A toxic level is ove 150. Atkins wasn't satisfied with the doctor's answers (Tr. 3-196; Ex. R5).

On April 29, 1982, Atkins had a quantitative test from Dr. drews. The doctor stated that 65 was high and he indicated the ate level was 150 milligrams. Atkins knew Legace was ex- riencing problems with a level of 86 or 87 (Tr. 49-53).

Atkins was the day foreman when MSHA inspector Frank B. ale came on the premises on May 4, 1982. A 3M tag was used to st for mercury. There were no fans and the inspector, accord- g to Atkins, was "staggered" at some of the readings (Tr. 60, , 221).

Atkins was not aware of the later MSHA visit on June 14. t in the interim Cyprus had taken corrective measures: these cluded warning signs, fume surveys, mercury testing and spirators (Tr. 223, 224, 318).

Within two or four days of the violation Atkins stopped at ale's office to talk about the testing equipment. He was also terested in seeing the MSHA books. Seale gave Atkins copies of

the Cyprus citation (Tr. 61-63). The citations had not been posted in the mine (Tr. 63). Atkins later received a full documentation from the MSHA Arizona office (Tr. 64).

There was probably more concern in the plant for ammonia than for mercury. There was no ventilation and you could feel the ammonia instantly (Tr. 64, 65).

After the MSHA inspection the company took care of the problem to a large degree (Tr. 65).

On June 9, 1982, Atkins visited Dr. Andrews, a pulmonologist. Complaints to Andrews included chemicals, ammonia, cyanide fumes and exposures to mercury. Complete blood and ur tests failed to confirm mercury poisoning. The blood mercury level was identified as less than 1. The reference range is l than 2.6; the level is potentially toxic if it is over 2.6 (Tr 202-204; Ex. R14).

On June 10, 1982, Dr. Givens, a company doctor, gave Atki a general physical examination. The symptoms exhibited by Atkins, which all occurred about June 10, included nausea, colitis and split vision. The doctor was more interested in writing than in listening so Atkins did not tell him all of hi symptoms (Tr. 54, 69, 70). Atkins showed Dr. Givens the quantitative test. He stated that things were "alright" (Tr. 55). Dr. Givens also told Atkins that his health was generall excellent. Dr. givens did not comment on the symptoms (Tr. 55

On June 29, 1982, Atkins saw Dr. Badshah, his family physician, to whom he also showed the quantitative test. Dr. Badshah diagnosed Atkins' condition as colon colitis. He also had a lower and upper G.I. performed as well as a rectal examination. The blood tests forwarded to Dr. Badshah by Dr. Andrews were normal (Tr. 55-58, 65, 215).

Atkins was concerned about his health and he mentioned to superintendent Leveaux that he would like to temporarily leave the ADR because of his health. Leveaux said management would need a doctor's statement to that effect (Tr. 65-67, 238). Atkins believed that the severity of the colon problem was worsening, and the condition was playing on his nerves. Atkin felt the ADR was unsafe for him because his medical problems started there and they were not clearing up. He was having sp vision, mostly in the right eye. This occurred four times in 30 day span just after he started going to Dr. Badshah (Tr. 68 69, 242). Badshah had suggested Atkins contact Dr. Schonders, ophthalmologist. The specialist, in turn, suggested that Atki go to the University because the problem was complicated (Tr. 213). Dr. Schonders, as well as Doctors Horgan, Andrews and Givens failed to confirm mercury poisoning. But Dr. Badshah s

ia, cyanide and fear of mercury exposure. Dr. Badshah gave
s a note which stated:

> To whom it may concern: Jim Leveaux. This patient is having cramping, abdominal pains, nausea. On exam there is marked spasticity of the colon. He is advised to avoid exposure to chemicals which are likely to aggravate this condition. (Tr. 71, 72, 215, 216; Ex. R23).

Leveaux looked at the doctor's note and stated it would be
sary to talk to Appelberg, the Cyprus personnel manager (Tr.
4). Appelberg told Atkins he would transfer him to utility
ut his pay. In the ensuing discussion Atkins claimed this
medical situation and his miner's rights guaranteed that he
his foreman's pay in the utility job. Appelberg agreed to
ransfer (Tr. 73-79). Atkins went to utility thinking he
retain his foreman's pay (Tr. 126-127).

The next day Appelberg told him his pay was cut. He could
r go back into ADR, leave the property, or be fired. Rather
be fired Atkins returned to the ADR. Atkins also stated he
ned to utility the next day (Tr. 73-79).

One day before he was terminated Atkins explained the
natum and medical situation to MSHA inspector Frank Seale at
SHA office. The next day (July 15) Atkins was told to work
e ADR or be fired (Tr. 78-81).

Before July 15th, between the two MSHA inspections, Atkins
old management that it was unsafe to work in the ADR. On
ay he was terminated he did not say it was unsafe because he
ore concerned about getting a note from the doctor than in
ng down the ADR (Tr. 243).

Atkins also told Appelberg that he needed to get out of the
It was unsafe for him (Tr. 238).

Atkins confirmed the contents of the typewritten note given
m by Appelberg when he was terminated and as well as his
ritten reply requesting an additional examination by a
ny doctor before he would return to the ADR (Tr. 112, 117,
119; Ex. C21, R24).

Atkins was fired on July 15 as he refused to work in the ADR.
evidence contains a two page medical report, dated July 16,
from Dr. Nur Badshah. The report states, in part, as
ws:

> IMPRESSIONS:
>
> 1. Loss of central vision of right eye, due to optic

3. Spastic colitis.

So far, I have not received the copies of the report from the pulmonologist. I recommend that patient needs to be further evaluated by a neurologist, because metallic poisoning can cause nervous system changes affecting especially the cerebellar system. This should be thoroughly evaluated by a neurologist. I also recommend that the patient should be thoroughly evaluated by a gastroenterologist for his gastrointestinal symptoms. Until he is further evaluated by a neurologist and gastroenterologist, patient is advised to avoid contact with chemicals and he has been given a note to that effect on 7-9-82. (Exhibit C14).

Atkins believed he suffered mercury poisoning in 1982. His quantitative test was 65. He could not state whether the ADR was a safe place to work in July 1982. When he discussed termination with Appelberg on July 15, 1982, he may not have claimed that it was unsafe to work in the ADR. But at the time of that discussion he believed the levels were close to acceptable and it could have been perfectly safe in the ADR (Tr. 109). Atkins would go back in the ADR today (Tr. 109-110). Further, he would have gone back if there hadn't been a problem (Tr. 124).

Before Atkins moved from Round Mountain he would have accepted a job in the ADR if it had been offered to him. He would not have gone back to work in the ADR in August or September 1982 because of a possible NIC medical evaluation (Tr. 99-100).

Atkins last hourly wage at Cyprus was $10.35 or $11.47 as the ADR foreman. If he had not been fired he would have earned $36,000. After being laid off in two months, Atkins found employment with Ray Dickinson earning $5 an hour. He worked there two and one-half months (Tr. 80-85). He was also employed at Teague Motor Company in 1984 earning $800 per month. In addition, he had a county job for three months earning $800. After the county job Atkins received unemployment compensation. He has not worked since that time except about eight months ago he occasionally played in a band on weekends. This part-time work pays $80 a weekend (Tr. 80-85, 94, 97, 98; Ex. C21, C27, C28). Atkins "guesses" that he has earned $300 playing in the band since he was terminated by Cyprus (Tr. 94).

The 1040 U.S. income tax returns for 1981 and 1982 show, respectively, wages of $12,924 and $15,639 (Tr. 89; Ex. C25, C26).

Atkins' trailer had been gutted before he acquired it in 1972 or 1973. At that time he paid $4,000 for it. He fixed it and estimated its value at $8,000. He sold it for $4,000 becau there was pressure on him to leave the company property (Tr. 87 93, 94).

After he sold the trailer Atkins moved back to Oregon thre and one-half months after he was terminated. There were two trips involved which cost him $800 to $900 for trailer rentals (Tr. 88, 109-110).

Atkins acknowledges that he received a written notice of having had eight absences in the previous twelve months (Tr. 11 Ex. R22).

Mrs. Atkins testified that her husband's health problems began in 1982. He complained and became irritable. Additional symptoms were mostly abdominal cramping and nasal headaches. S related his ill health to conditions in the mine because he had been in good health before working there (Tr. 250-252).

Respondent's Evidence

William Hamby, James Appelberg, Frank Seale and Sharon Badger testified for Cyprus.

William Hamby, the plant superintendent and metallurgist, indicated that Cyprus was closing down its operation in Septembe 1985. He did not expect to be employed at the end of 1985 (Tr. 253, 254, 296, 297).

Hamby and Atkins were in daily contact when Atkins began working as an operator in the ADR in October 1981. Atkins had successfully bid on the operator's job. As an ADR operator Atkins' duties included monitoring the pump, reagent mixing, and reagent determinations for strength, advancing carbon and mixing it (Tr. 256-261).

In February 1982, Cyprus learned of mercury problems in the ADR. The mercury, which came as a surprise to Cyprus, was detected by monitoring with a 3M 3600 Model badge type dosimeter (Tr. 265, 266).

In March 1982 Cyprus ordered and installed a 98,000 C.F.M. fan in the ADR (Tr. 296).

When Atkins became safety representative he voiced his concerns about the plant environment, the mercury and the quali of the air. He also complained about ammonia (Tr. 261). There were four leaky pipes about the plant but, for the most part,

lation to the possibility of mercury being in the plant (Tr. 262).

Hamby wasn't sure of the circumstances but Atkins told him that he believed it was unsafe or hazardous to work in the ADR (Tr. 262-263).

In April 1982 Atkins was promoted to working foreman. The position opened because Cyprus went to full production. Hamby, Leveaux and three other working foremen thought he was best qualified for the position (Tr. 263). Because of the direct line between management and foreman it was suggested to Atkins that he might want to relinquish his duties as safety representative (Tr. 264).

Hamby denies that he ever threatened Atkins' job. Once he told him he was shooting his mouth off. In a handwritten note, dated April 23, 1982, he recorded that he told Atkins to keep his opinions to himself about possible contamination by mercury. Further, some of the people were complaining that he didn't know what he was talking about and it was upsetting them. Atkins replied that he would "cool it" (Tr. 282, 283; Ex. R4).

On April 27 Hamby, in a letter to plant personnel, sought to bring all employees together with the plant hygienist and company doctor to discuss mercury (Tr. 269; Ex. R7).

The company considered mercury to be a problem because of the hazards associated with it. Before May 4 the company had taken steps to discover the source of the mercury levels by using a Bacharach MB-2 sniffer. On May 4, 1982, the new equipment was not operating properly. It had been inoperative for a week (Tr. 267-269).

On May 4 MSHA inspector Frank B. Seale inspected the ADR. On that day he issued five citations. They allege Cyprus failed to post warning signs concerning health hazards in the ADR; atmospheric concentrations of mercury vapor exceeded the excursion limit for an eight hour TWA coupled with a failure to use respiratory protection; failure to conduct fume surveys; failure to use shielding during arc welding and failure to guard a chain sprocket. The foregoing citations were subsequently abated by Cyprus (Tr. 171-179; Ex. R9).

On the day of the inspection 3M badges were placed on employees Herrera, White and Atkins. The 3M badges were analyzed. The analysis indicated the three refinery workers had been exposed to mercury fumes. The TWA rates for Herrera, White and Atkins were, respectively, .081, .084 and .168 (Mg/M3). Atkins'

issued by Inspector Seale on July 20, 1982, for the exposure to the mercury fumes to Herrera, White and Atkins that occurred on May 4, 1982 (Tr. 171, 172, 189, 190; Ex. R9). The delay of over three months was caused in part by the time required to analyze the exposure (Tr. 171, 172, 189, 190; Ex. R9). On August 10, 1982, Citation 2008502 was terminated when it was found that the TLV for mercury complied with the standard (Tr. 184; Ex. R27).

Witness Seale also testified generally converning the meaning of the TLV and TWA for mercury (Tr. 164-167; Ex. R6).

Hamby and Atkins discussed the TLV's. Atkins was always trying to convert the TLV's to parts per million. But there is no relationship between the two (Tr. 282).

After the MSHA inspection Cyprus continued to test for mercury by using 3M badges, sniffer equipment, as well as urine and blood sampling. Hamby discussed rules and practices with employees and instructed them to wear respirators (Tr. 268, 270-273, 285; Ex. R10, R11). The purpose was to address the mercury problem and protect the employees (Tr. 272). On one occasion Atkins was not wearing his respirator and Hamby advised him of the company policy (Tr. 174, 273; Ex. R11).

To alleviate the mercury problem Cyprus also hired D'Appalonea, a mercury clean-up company. They used sulfur dust an industrial vacuum cleaner and sponges to clean-up the ADR in June (Tr. 280; Ex. R12).

In June 1982 Cyprus also ordered a new ventilation system. It was installed in the ADR in August 1982 (Tr. 296).

In a performance report of July 6, 1982, Hamby rated Atkins unsatisfactory in hygiene, safety, housekeeping, willingness to work, dependability, attendance and initiative (Tr. 275, 277; Ex. R13).

Concerning attendance, it was company policy to advise an employee when he had accrued six absences. After missing eight days the employee receives a written warning stating that termination is possible on the tenth absence. Atkins was given a written warning on July 8, 1982, for his eighth absence. Atkins refused to sign the notice because of a disagreement over what constituted an excused absence (Tr. 276; Ex. R22).

Atkins' doctor said he couldn't be exposed to chemicals so he couldn't be placed back in the ADR (Tr. 289).

was terminated because he refused to work in the ADR (Tr. 289, 290). Hamby claimed the ADR was a safe place to work (Tr. 289, 290).

James M. Appelberg, the supervisor of office services for Cyprus, participated in the decision to fire Atkins (Tr. 299, 301).

According to Appelberg, Atkins requested a transfer to utility from ADR because mercury contamination and ammonia vapors were causing him diminished sight in one eye, sinus and nose problems, as well as inflammation of the lungs (Tr. 301). They had several conversations regarding the transfer. Dr. Badshah's note indicated he should not work in a chemical environment (Tr. 301, 302, 312). Atkins was unwilling to take a cut in pay. An MSHA representative recommended that Atkins be kept at his present level of pay (Tr. 301-304).

Atkins worked on the utility crew for three days then he went back to the ADR for a day shift. He returned to the ADR because the Cyprus supervisor in Denver stated Atkins would have to take an appropriate cut in pay if he remained on utility work (Tr. 303). In the period of July 13th to July 15th Appelberg expressed his opinion to Atkins that the ADR had not been determined to be a hazardous place to work. Atkins concern was to get himself out of the ADR because of the chemical vapors (Tr. 304, 305).

On July 15, Appelberg advised Atkins in a typed note that he (Atkins) had been given a physical exam on June 10th by Dr. Givens and approved to work in the ADR plant. The note further stated that since he continued to refuse to do his assigned work "you leave us no alternative but to terminate your employment" (Tr. 305; Ex. R24). Atkins' final options were to go on disability, NIC (Nevada Industrial Commission), or remain as ADR plant foreman. Appelberg indicated it would not be a job related illness (Tr. 304, 313, 316). Atkins replied something to the effect of "OK, fire me" (Tr. 305).

At the time of the termination Atkins wrote on the termination notice that he would work in the ADR if the company doctor would examine him and state in a letter that he was physically able to work in the mill atmosphere (Tr. 305, 306; Ex. R24). In his handwritten reply Atkins further referred to the letter of June 30, 1982, and stated that his doctor (Badshah) had found colon colitis and further found that chemicals were aggravating his condition. In addition, he could not stand the smell of ammonia in the ADR. The ammonia smell and the mercury in the plant had not been corrected (Ex. R24).

Appelberg replied that Atkins had been cleared for work company doctor five weeks before. Further, MSHA had abated t citations in the ADR, so there was no proven health problem (305, 306). Prior to the termination Appelberg had received a note (1 July 1982) from Dr. Givens stating, in part, that he not advised Atkins to consult outside medical help. Further, told Atkins that the company would assume no financial obligat for his self procured medical attention (Tr. 306; Ex. R20).

Dr. Givens, in a telephone conversation, told Appelberg he did not find that Atkins had been contaminated by mercury. In addition, Atkins should be able to perform his duties as p working foreman (Tr. 307).

During conversations between July 1st and 15th Atkins claimed he had miner's rights in that he would not have to tak pay cut if he was transferred to utility. An MSHA representat said the easiest approach was to transfer him to utility at hi current pay (Tr. 307, 308). According to Appelberg, Atkins assertion of his miner's rights did not enter into the decisio to terminate him (Tr. 308).

Atkins was earning $11.97 an hour as a working foreman compared with $9.33 as a utility worker (Tr. 309, 310).

Appelberg testified that Joseph Legace had worked in the for about two months. He filed a workmen's compensation claim alleging mercury contamination. The claim was disallowed (Tr. 310).

Sharon Badger, chief of benefit services for the State of Nevada Industrial Insurance System, indicated the state agency accepted Atkins' claim on September 17, 1982. On that day Atk was placed on temporary total disability that was back dated t July 9, 1982. Atkins received travel benefits and, in additio he was paid $8,226.16 ($38.44 a day x 214 days). He was also sent to Parnassus Heights Disability Consultants for a comprehensive integrated workup by medical specialists. The consultants were paid $6,753.23 for their services (Tr. 155-15

The disability evaluation by the Parnassus Consultants including psychological, neuropsychological and psychiatric examinations, "revealed that the patient's clinical picture warranted a diagnosis of Schizophrenia, Paranoid type. This of illness is considered virtually independent of environmenta etiology and is, therefor, not industrial in origin." (Ex. R3

Atkins status under temporary total disability was terminated on the basis of the Parnassus report. NIC's last payment was February 7, 1983 (Tr. 80-81, 153-159; Ex. R32).

ator bears the burden of proof with regard to the affirmative nse. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-38 ember 1982). The ultimate burden of persuasion does not t from the complainant. Robinette, 3 FMSHRC at 818 n. 20. also Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983); van v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir.)(specifically approving the Commission's Pasula-Robinette). The Supreme Court has approved the National Labor Re- ons Board's virtually identical analysis for discrimination s arising under the National Labor Relations Act. NLRB v. sportation Management Corp., 462 U.S. 393, 397-403 (1983).

The vast majority of cases arising under Section 105(c) of Minc Act concern matters of safety. However, the Commission ied the above legal analysis in Rosalie Edwards v. Aaron ng, Inc., 5 FMSHRC 2035 (1983), a case involving unsanitary et facilities.

In his post-trial brief Atkins asserts that his request for ansfer was a protected activity within the meaning of Section a)(7) of the Act; further, that he had a reasonable good h belief that the conditions in the ADR plant constituted a at to his safety or health; finally, that Cyprus' termination tkins was motivated by Atkins' protected activity.

We will initially consider whether a request for a transfer protected activity. In this regard Atkins relies on Section a)(7) of the Act which provides as follows:

> (7) Any mandatory health or safety standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that miners are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions safe use or exposure. Where appropriate, such mandatory standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring miner exposure at such locations and intervals, and in such manner so as to assure the maximum protection of miners. In addition, where appropriate, any such mandatory standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the operator at his cost, to miners exposed to such hazards in order to most effectively determine whether the health of such miners is adversely affected by such exposure. Where appropriate, the mandatory standard shall provide that where a determination is made that a miner may

suffer material impairment of health or functional capacity by reason of exposure to the hazard covered by such mandatory standard, that miner shall be removed from such exposure and reassigned. Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer. In the event of the transfer of a miner pursuant to the preceding sentence, increases in wages of the transferred miner shall be based upon the new work classification. In the event such medical examinations are in the nature of research, as determined by the Secretary of Health, Education, and Welfare, such examinations may be furnished at the expense of the Secretary of Health, Education and Welfare. The results of examinations or tests made pursuant to the preceding sentence shall be furnished only to the Secretary or the Secretary of Health, Education, and Welfare, and, at the request of the miner, to his designated physician.

Atkins' particularly relies on the underlined portion of ection 101(a)(7).

Atkins states there has not been any standard published ursuant to Section 101(a)(7). However, he argues that the only pplicable standard in this factual situation is the threshold imit value (TLV) for mercury adopted in 1973 by the American onference of Governmental Industrial Hygienists as contained in 0 C.F.R. § 55.5-1 (now recodified at 30 C.F.R. 56.5001).

Atkins has misconstrued the scope of the Mine Act. By its ery terms under § 105(c) the miners particularly protected are hose miner's that are the subject of medical evaluations and otential transfer under a standard published pursuant to Section 01. There are no medical evaluations or potential transfers now ontemplated within the terms of the TLV for mercury, 30 C.F.R. 56.5001. Accordingly, the above regulation cannot be held pplicable.

The Commission recently ruled that a miner may state a cause f action under Section 105(c)(1) if he is the subject of medical valuations and potential transfers under such a standard ublished by the Secretary. Goff v. Youghiogheny and Ohio Coal ompany, 7 FMSHRC 1776 (November 1985). But there was no ndication in the decision that the Commission intended to extend he doctrine any further than to encompass those situations where he Secretary specifically addressed, by his rulemaking uthority, the issues of medical evaluations and transfers. ompare the Secretary's extensive standards at 30 C.F.R., Part 90

conditions in the ADR plant constituted a threat to his safety or health. Atkins claims that he was suffering ill-effects to his health due to mercury contamination in the ADR plant. This conclusion is urged on the basis of certain facts:

First, coworkers Legace and Bowers had been diagnosed as having mercury poisoning in the Cyprus refinery. Further, Legace had described his symptoms in detail to Atkins.

Secondly, Atkins' quantitative urinalysis, taken at Legace's suggestion, revealed a level of 65 mcg/24 hours. Atkins was alarmed because 0-20 mcg/24 hours is considered normal but 65 mcg is still within the state's guidelines.

Thirdly, Atkins knew the atmospheric conditions in the ADR violated the MSHA TLV standards for mercury. Atkins had been with the MSHA inspectors when he monitored the mercury levels in the ADR. Atkins had seen the mercury in the tanks. He also knew the citations issued by Inspector Seale were not posted by Cyprus, hence, he knew the company was not being candid with its employees.

Fourth, Atkins' family doctor, Dr. Badshah, examined and treated him for his headaches, sinus and breathing problems, gastroenteropathy and spastic colon. Dr. Badshah told Atkins he thought the health problems were related to exposure to mercury vapor in the Cyprus mine. Dr. Badshah subsequently wrote a note for the plant manager, Jim Leveaux. Atkins then based his request for transfer to the utility crew on Dr. Badshah's advice.

Atkins' claim lacks merit. The first four incidents he relies on occurred several months before he was terminated. Specifically, the Legace/Bowers conversations took place in April 1982. The quantitative urinalysis was in the same month. The TLV excursion for mercury was in May 1982. The Badshah medical reports relate to previous alleged exposures.

Atkins certainly may have had a reasonable basis of concern for his health. But the pivitol issue is whether he had a reasonable good faith belief that the work he refused to do on July 15, 1982, was hazardous to his health at or about that time. Bush v. Union Carbide, 5 FMSHRC 993 (1983).

A careful study of the record causes me to conclude that no credible evidence supports Atkins' reasonable belief that the ADR was hazardous on or about July 15, 1982.

s safe. Particularly, Atkins indicated that corrective asures were taken by Cyprus between May 4 and June 15. These asures included fume surveys, mercury testing of the atmos- ere, and the use of respirators (Tr. 223, 224). Further, after MSHA citations the company attempted to cleanup the plant l, according to Atkins, Cyprus took care of the problem "to a eat degree" (Tr. 65). In addition, on June 9, 1982, complete ood and urine tests failed to confirm mercury poisioning (Tr. 2-204).

When he was asked about the conditions in the ADR on July 1982, Atkins said that he "believed the levels were close to ceptable." Further, the ADR "could have been perfectly safe at at time" (Tr. 108, 109).

Finally, Dr. Badshah's note of July 9, 1982, written for kins, addresses his physical conditions. It does not establish e conditions in the ADR at or about mid-July.

On his termination notice (Ex. C21, R24) Atkins wrote that would work in the ADR if the company doctor said he was physi- lly able to work in the mill atmosphere. His stated reason was at he could not stand the smell of ammonia. In addition, he serts the ammonia and the merc (mercury) had not been corrected . R24).

I do not find the statements concerning the mercury to be edible. At the hearing, when speaking of Exhibit R24, Atkins ted "[t]he mercury was not a problem" (Tr. 112, 113).

For the foregoing reasons Atkins refusal to work was not a otected activity.

Cyprus at all times asserted that the ADR was a safe place work at or about July 15th. But, since Atkins was not engaged an activity protected by the Act, it is not necessary to ex- ine respondent's evidence.

Briefs

Counsel have filed detailed briefs which have been most lpful in analyzing the record and defining the issues. I have viewed and considered these excellent briefs, However, to the ent they are inconsistent with this decision, they are re- cted.

Conclusions of Law

Based on the entire record and the factual findings made in e narrative portion of this decision, I enter the following

2. Respondent did not discriminate against complainant in violation of Section 105(c) of the Act.

ORDER

Based on the foregoing facts and conclusions of law, I enter the following order:

The Complaint of discrimination filed herein is dismissed.

John J. Morris
Administrative Law Judge

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